88-992

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DALLAS COUNTY COMMISSION, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals disregarded or failed to apply the clearly erroneous standard of Rule 52(a) when it concluded that the Trial Court's remedial plan did not remedy the Section 2 violation.

2. Whether the Court of Appeals disregarded or failed to apply the clearly erroneous standard of Rule 52(a) by concluding that the Trial Court erred when it failed to adopt a remedial plan offered into evidence by the Government for purposes of illustration, and not for adoption by the Trial Court (and with respect to the County Commission when such introduction was in a proceeding severed from the County Commission part of the case and while the County Commission portion of the case was in the Court of Appeals).

3. Whether the appellate court has the authority to adopt an election plan for the purpose of remedying a Section 2 violation without first determining if the plan in fact remedies the Section 2 violation, complies with Section 2, and complies with the equal protection clause of the Fourteenth Amendment to the United States Constitution; or without requiring the Trial Court to take evidence and make such determinations.

4. Whether the Court of Appeals erred by adopting an election plan to remedy a Section 2 violation which failed to satisfy or comply with the equal protection clause of the Fourteenth Amendment to the United States Constitution.

LIST OF PARTIES TO THE PROCEEDING

Defendants: DALLAS COUNTY, ALABAMA, a body corporate; the DALLAS COUNTY COMMISSION, governing body of Dallas County, Alabama; John W. Jones, Jr., Chairman Ex-Officio of the Dallas County Commission, Elray W. Baldwin (successor in office to C. Stanley Baldwin), W.H. Kendrick (successor in office to R. Furniss Ellis), James S. Wilkinson (successor in office to Gene Norris), Deans E. Barber, Jr. (successor in office to L. Seawell Jones), members of the Dallas County Commission; the DALLAS COUNTY BOARD OF EDUCATION; John J. Grimes, Sr., Dr. Catherine E. Bozeman, Elton R. Ralston, Harold Joe Bradford, William R. Martin, Frank Earnest.

Plaintiff: United States of America acting by and through its Department of Justice. Certain parties applied for intervention in the litigation, which application was denied in the District Court and was affirmed in the Court of Appeals. The parties applying for intervention were as follows: Samson Crum, Sr., Edwin Moss, Frederick D. Reese and Clarence Williams.

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The respective opinions of the United States District Court for the Southern District of Alabama, being in the nature of opinions applying or imposing a remedy in the vote dilution actions, are:

661 F.Supp. 955 (5/21/1987, respecting the County Commission) (See appendix A)
671 F.Supp. 1337 (10/23/1987 respecting the School Board) (See appendix B)

The opinions of the panel of the United States Court of Appeals for the Eleventh Circuit are reported, respectively, at:

850 F.2d 1430 (7/13/1988, respecting the County Commission) (See appendix C)
850 F.2d 1433 (7/13/1988, respecting the School Board (See appendix D)

On September 9, 1988 the Court of Appeals for the Eleventh Circuit denied motions for rehearing en banc. (App. E & F)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

DALLAS COUNTY COMMISSION, *et al.*
Defendants-Appellees.

On Writ of Certiorari to the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JURISDICTION

This petition seeks review of the decisions and judgments of the United States Court of Appeals for the Eleventh Circuit rendered July 13, 1988 and entered on said date. Petitions for rehearing en banc were denied by the Circuit Court by order rendered September 9, 1988. Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

Further, this petition invokes jurisdiction of the Court on the ground that the issues presented are issues and matters of first impression before this Court and that the Court of Appeals has rendered decisions in conflict with decisions previously rendered

by this Court and with the provisions of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS PROCEEDING

This case involves Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973; Rule 52(a), Federal Rules of Civil Procedure; and the Fourteenth and Fifteenth Amendments to the Constitution of the United States of America. See, respectively, Appendix I, J, G, and H.

STATEMENT OF THE CASE

This is a voting rights case. Jurisdiction is based upon the provisions of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended, also under the Fourteenth and Fifteenth Amendments to the Constitution of the United States. This Court has Federal question jurisdiction under the provisions of 28 U.S.C. 1331.

On May 16, 1986 the Trial Court entered an order concluding that the at-large system of electing members to the Dallas County Commission violated the provisions of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973, as amended. By previous order dated March 6, 1986 the Trial Court required the County Commission to adopt an election plan for the purpose of remedying the Section 2 violation, and to submit its plan to the United States Attorney General for preclearance in accordance with the provisions of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973(c).

On February 11, 1987 the Trial Court entered an order concluding that the at-large system of electing School Board members violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973, as amended. In that order the Trial Court required the School Board to adopt an election plan for the purpose of remedying the Section 2 violation and also ordered the

School Board to submit its plan to the United States Attorney General for preclearance in accordance with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973(c).

The County Commission adopted an election plan which called for four members to be elected from four single member districts and retaining the Judge of Probate of Dallas County as Chairman Ex-Officio of the County governing body. The Probate Judge of Dallas County has been the Chairman Ex-Officio of the County Commission throughout the history of the County. The County Commission submitted that plan to the Attorney General for preclearance but the Attorney General declined to preclear the plan.

On May 21, 1987 the Trial Court adopted a plan of election for the County Commission consisting of four single member districts and retaining the Judge of Probate as Chairman Ex-Officio. The Court's plan contains two majority black districts, one being 78.8% black and another being 63.2% black, and two majority white districts, one being 68.8% white, and another being 55.3% white. The population of Dallas County is 54.5% black. (App. A)

The School Board adopted an election plan which called for five members to be elected from five single member districts and submitted that plan to the Attorney Geneal for preclearance. The Attorney General declined to preclear the School Board plan and thereafter, on September 18, 1987, the Trial Court entered an order notifying all parties that the Trial Court intended to adopt an election plan for School Board elections which it had previously ordered into effect for the election of members of the Dallas County Commission. (App. K) Under the Trial Court's proposed plan Dallas County was divided into four single member districts from which four members would be elected. In addition, the Trial Court's plan called for a fifth member to be elected from the County at large.

On October 2, 1987 while the County Commission portion of the case was on appeal in the Eleventh Circuit, the Court conducted a hearing on its proposed remedial plan for the School Board pursuant to the requirements of *Edge v. Sumter Co. School District,* 775, F.2d 1509 (11th Cir. 1985). The Government objected to the proposed plan for the School Board and at the *Edge* hearing offered the testimony of its expert witness, Dr. Alan Lichtman. This testimony was offered for the purpose of providing testimony critical of the Trial Court's plan and to illustrate that a five single member district plan could be adopted rather than the Trial Court's plan which provided for an at-large feature. At the *Edge* hearing Dr. Lichtman did not offer detailed testimony regarding his five single member district plan. However, Dr. Lichtman did inform the Trial Court that he had prepared a five single member district plan and at the *Edge* hearing Government counsel agreed to make that plan available to the Trial Court. After the *Edge* hearing had been concluded Government counsel furnished the Trial Court with an election plan prepared by Dr. Lichtman. When submitting that plan and when offering Dr. Lichtman's oral testimony at the *Edge* hearing, Government Counsel made it clear that Dr. Lichtman's testimony and his plan were not being offered for adoption, but simply for the limited purpose of establishing that alternative methods were available to remedy the Section 2 violation. (See the Trial Court's Motion for Clarification, Appendix N). The County Commission defendants were not parties to these October, 1987 proceedings.

Following the *Edge* hearing, on October 23, 1987, the Trial Court entered an order adopting the remedial election plan which it had initially proposed for adoption on September 18, 1987. (See Appendix B). The Government appealed that order.

On appeal the Court of Appeals determined that the Trial Court's remedial plan failed to remedy the Section 2 violation. The Court of Appeals also held that the Trial Court erred when it did not adopt the Lichtman plan and ordered the Lichtman

plan into effect. That determination was made even though the Trial Court had never been requested to adopt the Lichtman Plan. Also, neither the Trial Court nor the Court of Appeals reviewed the Lichtman plan for the purpose of determining if it (1) remedied the Section 2 violation; (2) complied with Section 2; or (3) complied with other constitutional requirements, including the one man-one vote requirement. See *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362 (1964); *Swann v. Adams,* 385 U.S. 440, 87 S.Ct. 569 (1967); *Kirkpatrick v. Preisler,* 394 U.S. 526, 89 S.Ct. 1225 (1969); *Abate v. Mundt,* 403 U.S. 182, 91 S.Ct. 1904 (1971); *Chapman v. Meier,* 420 U.S. 1, 95 S.Ct. 751 (1975); *Connor v. Finch,* 431 U.S. 407, 97 S.Ct. 1828 (1977); *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493 (1978); see also *Edge v. Sumter County School District, supra.*

It is to be noted that the Lichtman Plan was never introduced in the County Commission portion of the case and that the County Commission defendants had never seen that plan prior to the July 13, 1988 panel decision of the Court of Appeals. The Lichtman plan removed the Judge of Probate as Chairman of the County Commission and added a new Commissioner. The County Commission has historically consisted of four Commission members with the Judge of Probate serving as Chairman.

The Lichtman plan divided Dallas County into five single member districts from which five members would be elected. That plan however, did not comply with the one man-one vote requirements of *Reynolds v. Sims, supra,* and contained a population deviation of .0949% between the district with the largest population and the district with the smallest population. The Trial Court's plan permitted a total deviation of .0272% and the plan prepared by the School Board (rejected by the Attorney General) provided for a total deviation of only .0260%. The Court of Appeals made no effort to explain or justify the population deviation of .0949% in the Lichtman plan although that deviation could have been avoided. See, *Swann v. Adams,* 385 U.S. 440, 87 569 (1967); *Kirkpatrick v. Preisler,* 394 U.S.

526, 89 S.Ct. 1225 (1969); *Chapman v. Meier,* 420 U.S. 1, 95 S.Ct. 751 (1975).

After the Court of Appeals denied petitions for rehearing en banc and issued its mandate, the District Court filed in the Court of Appeals a motion for clarification of the mandate. See appendix N. The motion was denied by order rendered and entered on October 6, 1988. (See appendix L). The School Board and County Commission defendants each filed motions requesting the Court of Appeals to stay its mandate pending the filing of this Petition for Writ of Certiorari. Those motions were denied by the Court of Appeals.

ARGUMENT

This Petition for Writ of Certiorari should be granted because the decisions of the Court of Appeals decided important questions of federal law which have not been, but should be settled by this Court; the decisions of the Court of Appeals directly conflict with, and are contrary to applicable decisions of this Court; and when rendering its decisions, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings that direct supervision from this Court is required.

In these cases the Court of Appeals rejected remedial election plans adopted by a Trial Judge who had handed the litigation since its filing in 1978. The Court of Appeals made an independent analysis of the evidence and reversed the Trial Court's factual findings without making reference to or applying the clearly erroneous standard of Rule 52(a), Federal Rules of Civil Procedure. Having rejected the Trial Court's plan in a manner contrary to Rule 52(a), the Court of Appeals next concluded that the Trial Court also erred when it failed to adopt the Lichtman plan, a plan never presented to the Trial Court for adoption. See the Trial Court's Motion for Clarification (Appendix, N).

We submit that the Court of Appeals has departed from accepted judicial practices in these cases, and we emphasize the fact that the Lichtman plan was imposed as a remedy in the County Commission case even though the Lichtman plan was never introduced into evidence in the County Commission litigation. The Lichtman plan was introduced into evidence in the School Board litigation *after* the Trial Court had concluded an *Edge* hearing on the Trial Court's remedial plan. At that time the County Commission litigation was then on appeal before the Eleventh Circuit Court of Appeals.

The *Edge* hearing was conducted by the Trial Court for the sole purpose of allowing the School Board and the Government an opportunity to introduce evidence on relevant Section 2 issues as they related to the Trial Court's proposed remedial

plan. The *Edge* hearing was conducted for a limited purpose and the Government's decision to submit the Lichtman plan to the Trial Court *following* that hearing was also done for a limited purpose. At no time did any party suggest that the Trial Court should adopt the Lichtman plan as a remedy in these cases and the Court of Appeal's decision to adopt that plan, and to do so without a remand, constitutes an abuse of appellate authority and judicial discretion.

In its opinions the Court of Appeals, citing its earlier decisions in *Dillard v. Crenshaw County, Ala.*, 832 F.2d 246 (11th Cir. 1987) and *Edge v. Sumter Co. School District,* 775 F.2d 1509 (11th Cir. 1985), recognized that "it is clear that any proposal to remedy a Section 2 violation must itself conform with Section 2." Although the Lichtman plan was not considered for adoption by the Trial Court, and was not offered for adoption by Government counsel, the Court of Appeals ordered that plan into effect. When remanding these cases to the Trial Court the Court of Appeals did not require the Trial Court to make any determination on remand as to whether the Lichtman plan remedied the Section 2 violation, complied with Section 2, or if it complied with other constitutional requirements, including the one man-one vote requirements of *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362 (1964). Instead, the Court of Appeals simply ordered the Trial Court to implement the Lichtman plan and schedule elections for the School Board and the County Commission. Unless this Court acts, the School Board and County Commission elections will be conducted under an election plan which has not been reviewed by any Court for the purpose of determining if the plan remedied the Section 2 violation, complies with Section 2, or complies with other constitutional requirements, including the one man-one vote requirements of *Reynolds v. Sims, supra.* This result is clearly contrary to the Eleventh Circuit's decisions in *Dillard v. Crenshaw County, supra*, and *Edge v. Sumter Co. School District, supra*, and further evidences the extent to which the Court of Appeals has departed from accepted judicial proceedings in these cases. We

also submit that this result presents an important federal issue which has not, but which should be decided by this Court.

The Court of Appeals adopted the Lichtman plan even though it had previously concluded in *Edge v. Sumter Co. School District, supra*, that a remedial election plan *could not* be adopted by a Trial Court, and presumably an appellate court, without a finding that the remedial plan complied with Section 2. The *Edge* Court concluded that in order to make this determination a hearing must be held by the Trial Court for the purpose of allowing the parties to submit evidence on relevant Section 2 issues. In these cases the Court of Appeals not only disregarded the clearly erroneous standard of Rule 52(a), the Court of Appeals also failed to determine if the Lichtman plan complied with Section 2 and thus failed to follow its own decisions.

The Court of Appeals failure to remand these cases to the Trial Court after deciding the Trial Court's remedial plan did not comply with Section 2, and the Court of Appeals' unusual decision to reverse a Trial Court for not adopting a plan never offered to the Trial Court for adoption, presents an important federal question which has not, but which should be decided by this Court. Voting rights cases are fact intensive cases. When dealing with liability issues in a voting rights case a Trial Court is required to consider and weigh a number of facts and must ultimately determine liability based upon the totality of the circumstances. *Rogers v. Lodge,* 458 U.S. 613, 102 S.Ct. 3272 (1982). After liability issues have been decided and the litigation moves to the remedy phase, the Trial Court is again required to make an intensive factual analysis in order to implement an appropriate remedy. Under the Eleventh Circuit Court of Appeals decisions in *Dillard v. Crenshaw County, Ala., supra*, and *Edge v. Sumter Co. School District, supra*, the same factual analysis followed by the Trial Court in determining liability issues must be followed when adopting a remedy since the Trial Court is required to insure that the remedial plan cures the Section 2 viola-

tion, and must also conclude that the remedial plan complies with Section 2. In order to make these independent determinations, we submit that a factual analysis is required and that appellate courts, including the Eleventh Circuit, are not in a position to make the required analysis. We also submit that in these cases not only did the Court of Appeals fail to make these determinations, it had no evidence upon which it could rely in making such determinations since no evidence was ever submitted in these cases relating to Section 2 issues and the Lichtman plan.

The Government instituted this litigation for the purpose of ending the at-large method of electing School Board and County Commission members. The School Board had historically been comprised of five members, all elected from the county at large. The Chairman of the School Board was elected by the members of the School Board. The County Commission had historically been comprised of four members, all of whom were elected at large. The Chairman of the County Commission was the Judge of Probate (elected at large) who is also a judicial officer with a number of additional statutory duties in addition to his legislative duties as Chairman of the County Commission.

Under the Trial Court's remedial plan for the School Board four School Board members were to be elected from four single member districts. A fifth member was to be elected from the county at-large, and the five members would then select the Chairman of the School Board. Under the Trial Court's plan for the County Commission four County Commission members were to be elected from four single member districts, with the Judge of Probate continuing his historical role as Chairman of the County Commission. The Trial Court not only attempted to remedy the Section 2 violation, but in doing so, the Trial Court attempted to reconcile the remedy with established legal and political policy considerations as he was required to do under this Court's decision in *Upham v. Seamon,* 456 U.S. 37, 102 S.Ct. 1518 (1982).

Under the Lichtman plan five School Board members and five County Commission members will be elected from five single member districts. While this format will not affect the historical make-up of the School Board, the effect of the Lichtman plan on the role of the Judge of Probate is substantial. Under the Lichtman plan the Judge of Probate will no longer serve as Chairman of the County Commission, and will no longer have a legislative role in county government. Instead, the County Commission membership will be increased from four to five members, all of whom will be elected from single member districts. The five members will select one member to serve as Chairman. The Lichtman plan thus strips the Judge of Probate of his historical legislative functions. By adopting the Lichtman plan, the Court of Appeals imposed a remedy which substantially affected long standing state policy considerations without ever attempting to reconcile the remedial needs of these cases with established state policies. This result occurred when the Court of Appeals adopted the Lichtman plan on appeal rather than remanding these cases to the Trial Court for an appropriate remedy. The Court of Appeals is not a proper forum for the factual analysis required to implement a remedial election plan and is clearly not the proper forum to determine, in the first instance, if the remedy is appropriate under the circumstances or if the remedy contravenes established policy considerations long held by the affected political subdivision. The Court of Appeals decision to adopt the Lichtman plan on appeal was an arbitrary decision, and one that should not have been made without substantial guidance from the Trial Court who was familiar with the local situation given his ten year involvement in the case as Trial Judge.

Not only do the decisions of the Court of Appeals represent a departure from the accepted and usual course of judicial proceedings, the decisions directly conflict with decisions of this Court in several critical areas. First, in May, 1988, this Court was again called upon to remind the Eleventh Circuit Court of Appeals that it was required to follow and apply the clearly er-

roneous standard of Rule 52(a), and that the Court of Appeals could not substitute its own factual findings for those of the Trial Court simply because the Court of Appeals did not agree with the Trial Court's findings, or would have made different findings had it been sitting as the Trial Court. *Amadeo v. Zant,* ____ U.C.____, 108 S.Ct. 1771, decided May 31, 1988. See also, *Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781 (1982). In the cases below the Court of Appeals, some 43 days following this Court's decision in *Amadeo v. Zant, supra,* again usurped the role and function of the Trial Court, and again declined to follow or comply with the provisions of Rule 52(a).

Secondly, the Lichtman plan contains a population deviation of .0949% between the district with the largest population and the district with the smallest population. The Court of Appeals did not discuss this population deviation in its decisions and although the deviations could have been easily avoided, the Court of Appeals made no effort to avoid these deviations and made no effort to justify the deviations or even explain why they should be permitted to stand.

Petitioners present four issues by this Petition for Writ of Certiorari. Two issues involve application of Rule 52(a), and we submit that, notwithstanding this Court's repeated admonishments to the Eleventh Circuit Court of Appeals, the Eleventh Circuit has failed to apply that standard in these cases. A third issue involves the authority of an appellate court to adopt a remedial election plan in order to remedy a Section 2 violation without making any determination as to whether the plan remedies the Section 2 violation, complies with Section 2, or complies with the one man-one vote requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; or without first requiring the Trial Court to make these determinations. In these cases the Court of Appeals failed to make these determinations and remanded the cases to the Trial Court with directions that the plan be implemented rather than reviewed by the Trial Court and the par-

ties for compliance with the laws and Constitution of the United States. The fourth issue presented is simply whether the Court of Appeals erred when it adopted a remedial election plan which failed to comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Lichtman plan contained a substantial population deviation between the largest and smallest district and the Court of Appeals adopted that plan without acknowledging the deviations and without making any effort to explain or justify those deviations.

Whether The Court Of Appeals Disregarded Or Failed To Apply The Clearly Erroneous Standard Of Rule 52(a) When It Concluded That The Trial Court's Remedial Plan Did Not Remedy The Section 2 Violation.

On the issue of whether a Trial Court has erred in implementing a remedy for a Section 2 violation, the standard of review is the clearly erroneous standard of Rule 52(a), Federal Rules of Civil Procedure. *Thornburg v. Gingles,* ____ U.S. ____, 106 S.Ct. 2752 (1986); *Rogers v. Lodge, supra.* When fashioning a remedy in a voting rights case a Trial Court is vested with broad remedial authority, and its judgment must be affirmed, absent legal error, an abuse of discretion, or reliance upon material factual findings unsupported by the record. *Thornburg v. Gingles, supra*; See also, *Dillard v. Crenshaw County, Ala., supra.*

In these cases the Court of Appeals concluded that the Trial Court's remedial plan did not comply with Section 2. In reaching that conclusion the Court of Appeals reviewed the record below and simply rejected the Trial Court's ultimate factual finding that its remedial plan constituted a fair election plan. In doing so, however, the Court of Appeals made an independent analysis of the evidence and disregarded the findings of fact relied upon by the Trial Court without ever concluding that any of those factual findings were clearly erroneous.

During its review the Court of Appeals made no reference to the standard of review which it used to review the Trial Court's judgment. A reading of the Court of Appeals opinion makes it clear that none of the Trial Court's factual findings, including its ultimate finding that its plan constituted a fair plan, were found to be clearly erroneous. Instead, the Court of Appeals made an independent review of the record, and based upon that review, made its own factual findings, complete with citations to the record to "buttress" those findings. We note that not only did the Court of Appeals make independent factual findings, it made incorrect "findings of fact," including an erroneous finding that there was "a complete absence of black officials elected to the Dallas County Board of Education." That "finding" is clearly erroneous since the record shows that Dr. Catherine Bozeman, a black female, was elected to the School Board in 1984.

Because a remedial election plan requires a searching and intense analysis of facts, *Thornburg v. Gingles, supra*; *Rogers v. Lodge, supra*, the Court of Appeals was hardly in position to reject the Trial Court's plan without applying the clearly erroneous standard. In *Pullman-Standard v. Swint, supra*, this Court, when reversing a decision rendered by the Eleventh Circuit Court of Appeals, said:

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.
>
> * * * * *
>
> First, although the Court of Appeals acknowledged and correctly stated the controlling standard of Rule 52(a), the

> acknowledgment came late in the court's opinion. The court had not expressly referred to or applied Rule 52(a) in the course of disagreeing with the District Court's resolution of the factual issues deemed relevant under *James v. Stockham Valves & Fittings Co.*

456 U.S. 273, at 288 and at 291-292.

In the recent Supreme Court decision *Amadeo v. Zant, supra*, decided May 31, 1988, the Supreme Court held that the Eleventh Circuit had failed to comply with the requirements of Rule 52(a). This Court said:

> Hence, the Court of Appeals offered factual rather than legal grounds for its reversal of the District Court's order, concluding that neither of the two factual predicates for the District Court's legal conclusion was adequately supported by the record. The Court of Appeals never identified the standard of review that it applied to the District Court's factual findings. It is well settled, however, that a federal appellate court may set aside a Trial Court's findings of fact only if they are "clearly erroneous," and that it must give "due regard . . . to the opportunity of the Trial Court to judge of the credibility of the witnesses." [CITATIONS OMITTED]. We have stressed that the clearly erroneous standard of review is a deferential one, explaining that "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. [CITATION OMITTED]
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> * * * * *
>
> The Court of Appeals acknowledged that the District Court had found these facts. See 816 F.2d at 1507. *But without examining the record or discussing its obligations*

> *under Rule 52(a), the court simply expressed disagreement and substituted its own facutal findings for those of the District Court.* [EMPHASIS ADDED].

108 S.Ct. 1771, at 1777.

On the issue of whether the Trial Court's plan complied with Section 2 the Court of Appeals made no reference to, and presumably did not apply, the clearly erroneous standard. Further, the Court of Appeals did not conclude, as we understand it must, that factual findings made by the Trial Court were clearly erroneous; did not find that the Trial Court failed to make a finding because of an erroneous view of the law; and did not refer to or apply Rule 52(a) in the course of disagreeing with the Trial Court's remedial plan. To the contrary, the Court of Appeals reviewed the record, noted its disagreement with the findings of the Trial Court, and then substituted its own judgment for that of the Trial Court. In order to reject the Trial Court's remedial plan, the Court of Appeals apparently relied upon the testimony of an expert witness called by the Government, a witness who obviously did not impress the Trial Court. See Gibson, J., dissenting, at pp. 1445-46, *U.S. v. Dallas County Com'n, Dallas County, Ala.*, 850 F.2d 1433 (11th Cir. 1988) (Appendix D).

Whether The Court Of Appeals Disregarded Or Failed To Apply The Clearly Erroneous Standard Of Rule 52(a) By Concluding That The Trial Court Erred When It Failed To Adopt A Remedial Plan Offered Into Evidence By The Government For Purposes Of Illustration And Not For Adoption By The Trial Court (And With Respect To The County Commission When Such Introduction Was In A Proceeding Severed From The School Board Part Of The Case And The County Commission Portion Of The Case Was On Appeal Before The Court Of Appeals).

The Court of Appeals, having found that the Trial Court's election plan failed to remedy the Section 2 violation, next

reviewed the Trial Court's analysis of the Lichtman plan. We again note that the Lichtman plan was never offered to the Trial Court for adoption and was never made a part of the County Commission litigation. During its review, the Court of Appeals applied the clearly erroneous standard of Rule 52(a) and concluded that the Trial Court erred when it did not adopt the Lichtman plan as a remedy in these cases. The Petitioners suggest, however, that even if the Court of Appeals properly determined that the Trial Court's factual findings regarding the Lichtman plan were clearly erroneous, it simply does not follow that the Lichtman plan is an appropriate remedy in these cases. This is especially true since the Government did not offer the plan for adoption, but only for the limited purpose of demonstrating that a five single member district plan (not necessarily the Lichtman plan) could be utilized by the Trial Court as a remedy.

We submit that the Court of Appeals abused its appellate authority and substantially departed from the accepted and usual course of judicial proceedings when it determined that the Trial Court erred when it failed to adopt an election plan that was never offered to the Trial Court for adoption. See the Trial Court's Motion for Clarification (Appendix N). We remind this Court that the Trial Court, in keeping with the Eleventh Circuit's mandate in *Edge v. Sumter Co. School Dist., supra*, was required to conduct a hearing before it adopted any remedial plan. The Trial Court conducted an *Edge* hearing which was conducted for the sole and limited purpose of affording the School Board and the Government an opportunity to offer relevant evidence on Section 2 issues as such evidence related to the Trial Court's proposed election plan. *Edge v. Sumter Co. School Dist., supra.* On September 18, 1987, the Trial Court entered an order (Appendix K) notifying the School Board and the Government that it intended to adopt the same election plan which it had previously ordered into effect for County Commission elections. The Trial Court specifically ordered the conduct of an *Edge* hearing in its September 18, 1987, order (Appendix

K), and it was clear to all parties that the sole and limited purpose of that hearing was to allow the parties an opportunity to review the Trial Court's proposed plan. Under these circumstances, and given the mandate of the Eleventh Circuit in *Edge v. Sumter Co. School Dist., supra*, it was simply unreasonable for the Court of Appeals to expect the Trial Court to adopt the Lichtman plan at a hearing not scheduled for that purpose. This is particularly so since under *Edge* the Trial Court could not have adopted the Lichtman plan without first affording the School Board and the Government an opportunity to present evidence for or against the Lichtman plan. In *Edge v. Sumter Co. School Dist., supra*, the Eleventh Circuit Court of Appeals held:

> We agree with both the appellants and the submission of the United States as *amicus curiae* that the district court could not validly adopt a reapportionment plan without determining whether the plan complied with Section 2 of the Voting Rights Act, as amended, 42 U.S.C.A. § 1973. [CITATIONS OMITTED].
>
> * * * * *
>
> A hearing must be held to permit the parties to submit evidence on the Section 2 issues. Although appellants submitted documentary evidence on some of the relevant factors, the district court held no hearing before adopting the plan and made no analysis in its decision of the factors that may indicate that the plan results in prohibited discrimination.

775 F.2d 1509, at 1510-11.

Since the Trial Court did not schedule or conduct an *Edge* hearing on the Lichtman plan, and the parties did not present any evidence on that plan, there was no evidence on Section 2 issues from which the Trial Court (or the Court of Appeals) could reach any determination as to whether the Lichtman plan

"results in prohibited discrimination," or if it remedied or in fact complied with Section 2. For this reason the Trial Court did not err when it failed to adopt the Lichtman plan and it is clear that the Trial Court would have violated the express mandate of *Edge* had it adopted the Lichtman plan at the October 2, 1988, hearing.

Under the most favorable circumstances of this case, if the Trial Court erred, it did so when it did not schedule and conduct an *Edge* hearing for the purpose of determining if the Lichtman plan should have been adopted. If that was the error detected by the Court of Appeals in this case then the appropriate remedy was an order remanding the cases to the Trial Court for the purpose of conducting an *Edge* hearing on the Lichtman plan. By concluding the Trial Court erred when it did not adopt the Lichtman plan, and ordering that plan into effect, the Court of Appeals not only departed from accepted and normal judicial proceedings, it failed to follow or enforce its own decisions, and abused its appellate authority by reversing a Trial Court who committed no error.

Whether An Appellate Court Has The Authority To Adopt An Election Plan For The Purpose Of Remedying A Section 2 Violation Without First Determining If The Plan In Fact Remedies The Section 2 Violation, Complies With Section 2, And Complies With The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution; Or Without First Requiring The Trial Court To Take Evidence On Those Issues.

We have searched the decisions of this Court and those of the Court of Appeals for the Eleventh Circuit and the other Circuit Courts of Appeals and have not found any decision where an appellate court has imposed or adopted an election plan as a remedy in a voting rights case. We believe the reason rests with the fact that an appellate court is not in a position to impose a remedy in a voting rights case since imposition of a remedy

necessarily requires a complete assessment of facts as well as a careful and delicate balancing process to insure that the remedy is appropriate but does not exceed the Section 2 violation, or unduly interfere with legitimate and long standing governmental interests and policy considerations.

Under the Eleventh Circuits decisions in *Edge v. Sumter Co. School Dist., supra*, the Court of Appeals was obligated to remand the proceedings to the Trial Court for the purpose of determining if the Lichtman plan remedied the Section 2 violation and if it complied with Section 2. Under this Court's decisions in *Chapman v. Meier,* 420 U.S. 1, 95 S.Ct. 751 (1975), and *Swann v. Adams,* 385 U.S. 440, 87 S.Ct. 569 (1967), if the Court of Appeals wished to adopt the Lichtman plan it was required to avoid the substanial population deviations contained in that plan or to explain or justify the deviations if they could not be avoided. Since the Court of Appeals could not supervise the redrafting of the Lichtman plan without a remand, and given its decision to adopt that plan without a remand, it then became the Court of Appeals' obligation to explain or justify the population deviations or reject the plan. Because the Court of Appeals refused to explain or justify the Lichtman plans' .0949% population deviation, and refused to remand these cases to the Trial Court for guidance on those factual issues, the Court of Appeals acted contrary to the decisions of this Court.

The Court of Appeals rejected the Trial Court's election plan which provided for four single member districts but retained the Judge of Probate as Chairman of the County Commission, and replaced that plan with the Lichtman plan which added a new member to the County Commission and also excluded the Judge of Probate as Chairman of the County Commission. That action denied the Judge of Probate his historical legislative functions and constituted a substantial intrusion on the political and governmental policy considerations of long standing in the State of Alabama and Dallas County. This Court has spoken to the limits of federal authority in imposing election plans upon State Government. *Upham v. Seamon, supra.*

There can be no doubt that the Lichtman plan intrudes upon State policy, as that plan alters as established policy of the Legislature of Alabama that the Chairman of the County Commission be the Judge of Probate, and that the Chairman of the County Commission be elected by all of the citizens of the county. The Lichtman plan, as respects the County Commission, also creates a new governmental position by adding an additional commissioner and leaves the County Commission without any elected official elected by all of the citizens of the county as a member of the county governing body. In this regard the Lichtman plan exceeds the authority of the Federal Courts and by imposing the Lichtman plan without a remand, the Court of Appeals has decided a federal question in a way that is in conflict with the applicable decisions of this Court. In *Upham v. Seamon, supra*, this Court said:

> In fashioning a reapportionment plan or in choosing among plans, a District Court should not preempt the legislative tasks nor 'intrude upon state policy any more than necessary.'' *White v. Weiser,* 412 U.S., at 794-795, 93 S.Ct. 2354 (CITATIONS OMITTED).

456 U.S. 37, at 42, and 102 S.Ct. 1518, at 1521, and went on to say:

> It is true that this Court has held that court-ordered reapportionment plans are subject in some respects to stricter standards than are plans developed by a state legislature. *Wise v. Lipscomb,* 437 U.S. 535, at 540, 98 S.Ct. , at 2497; *Connor v. Finch,* 431 U.S. 407, 414, 97 S.Ct. 1828, 1833, 52 L.Ed.2d 465 (1977). This stricter standard applies, however, only to remedies required by the nature and scope of the violation: ''The remedial powers of an equity court must be adequate to the task, but they are not unlimited.'' *Whitcomb v. Chavis, supra*, at 161, 91 S.Ct., at 1761.
>
> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go for-

> ward it is faced with the problem of "reconciling the requirement of the Constitution with the goals of state political policy." *Connor v. Finch, supra*, at 414, 97 S.Ct. at 1833. An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect.

456 U.S. 37, at 42-43, 102 S.Ct. 1518 at 1521-22.

The Court of Appeals has recognized in the past the teachings of *Upham,* and in fact stated in its opinion in *Edge v. Sumter Co. School Dist., supra*, as follows:

> If is not at all clear that the Attorney General's objections encompassed the at-large district submitted by the Board. If the Board submitted plans could be modified to meet constitutional and statutory requirements and preserve the legislative preference of one at-large district and six single-member districts, it was *incumbent* on the court under *Upham* to design such a remedy. (EMPHASIS ADDED)

775 F.2d 1509, at p. 1512.

The Court of Appeals, by adopting the Lichtman plan, and substituting itself for the Trial Court, has ignored the limits imposed by the *Upham* decision. Illustrative of this would be alternative choices available to the Trial Court had the Court of Appeals' properly remanded this case to the Trial Court for implementation of an appropriate remedy. The Trial Court, for example, could simply have denied the Chairman voting power in the case of a tie rather than destroying the Judge of Probates' historical role as a Chairman of the County Commission. While this one illustration is not the only alternative that would have been available to the Trial Court on a remand, it is offered simply to show the lack of consideration given by the Court of Appeals to the mandate of the *Upham* case.

The Supreme Court has been careful to preserve factfinding functions and fashioning of remedy functions to the Trial

Court, and illustrative of this is its statement in the case of *Perkins v. Matthews,* 400 U.S. 379, 91 S.Ct. 431 (1971):

> . . . since the district court is more familiar with the nuances of the local situation than we are, and has heard the evidence in this case, we think the question of the appropriate remedy is for that court to determine, in the first instance, after hearing the views of both parties.

400 U.S. 379, at 398.

The decision in *Perkins,* as well as that in *Upham,* make it clear that the function of determining a remedial plan rests with the Trial Court. It is submitted that not only does the decision of the Court of Appeals in these cases so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, but that the same also is in conflict with the applicable decisions of this court. Certainly on the record in this case it is hard to conceive how the argument could be made that the Court of Appeals had a record upon which it could conclude whether there were remedies less intrusive upon state policy than the Lichtman plan which would cure the Section 2 violation.

Whether The Court Of Appeals Erred By Adopting An Election Plan To Remedy A Section 2 Violation Which Failed To Satisfy Or Comply With The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution.

The Trial Court's plan provided for four single member districts with one at-large district. The population figures are set forth below:

Total Population	Deviation - Number of Voters	Percent Deviation
13,377	−118.25	−.0087
13,745	+249.75	+.0185
13,344	−151.25	−.0112
13,515	+19.75	+.0014
MEAN DISTRICT POPULATION SIZE		13,495.25
TOTAL DEVIATION FROM MEAN (HIGH AND LOW):		.0272%

The Lichtman plan provided for 5 single member districts. The population figures are set forth below:

Total Population	Deviation - Number of Voters	Percent Deviation
10,455	−341.20	−.0316
10,481	−315.20	−.0291
11,101	+304.80	+.0282
11,480	+683.80	+.0633
10,464	−322.20	−.0298
MEAN DISTRICT POPULATION SIZE		10,796.2
TOTAL DEVIATION FROM MEAN (HIGH AND LOW):		.0949%

As shown above, the total deviation in population between the district with the largest populaton and the district with the smallest population in the Trial Court's plan is .0272%. The School Board's five single member district plan (rejected by the United States Attorney General under his Section 5 review) had a total deviation of .0260%. The Lichtman plan, however, calls for a total deviation of .0949%, and Petitioners submit that the Lichtman plan violates the Equal Protection Clause of the Fourteenth Amendment and the one man-one vote principle established by the Supreme Court in *Reynolds v. Sims, supra.*

In *Abate v. Mundt,* 403 U.S. 182, 91 S.Ct. 1904 (1971) this Court held:

> It is well established that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections, *Avery v. Midland County,* 390 U.S. 474, 481, 88 S.Ct. 1114, 1118, 20 L.Ed. 2d 45 (1968). "Mathematical exactness or precision is hardly a workable constitutional requirement," *Reynolds v. Sims,* 377 U.S. 533, 577, 84 S.Ct. 1362, 1389, 1390, 12 L. Ed. 2d 506 (1964), but deviations from population equality must be justified by legitimate state considerations, *Swann v. Adams,* 385 U.S. 440, 444, 87 S.Ct. 569, 572, 17 L. Ed. 2d 501 (1967). Because voting rights require highly sensitive safeguards, this Court has carefully scrutinized state interests offered to justify deviations from population equality.

403 U.S. 182, at 185.

While the Court of Appeals' decisions are principally concerned with Section 2 issues, if the Court of Appeals had the authority to adopt remedial election plans for School Board and County Commission elections, it had the concomitant duty to also insure that the election plans complied with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and to make a good faith effort to achieve population equality. When it became apparent that the Lichtman plan did not provide substantial equality among the districts, the Court of Appeals was then duty bound to determine if the deviations were justified by legitimate state considerations. If not, under this Court's decisions, the Court of Appeals was obligated to reject the Lichtman plan.

In *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir., 1973) (en banc) *aff'd* on other grounds *sub nom. East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083 (1976) the Court of Appeals observed:

> Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population. Both the Supreme Court and this court have long differentiated between these two propositions.

485 F.2d 1297, at 1303.

In these cases the Court of Appeals not only failed to consider the one man - one vote requirements, the Court of Appeals also adopted a plan which had never been tested for compliance with Section 2. We submit that by so acting, the Court of Appeals has decided these cases in a way which directly conflicts with the decisions of this Court.

It is clear that where a court imposes an election plan, the Court's plan is held to higher standards than a plan which is adopted by a legislative body. *Chapman v. Meier, supra; Connor v. Finch,* 431 U.S. 407, 97 S.Ct. 1828 (1977); *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493 (1978). With a court plan, any deviation from approximate population equality "Must be supported by enunciation of historically significant state policy or unique features." *Chapman v. Meier, supra, Connor v. Finch, supra.* In *Chapman v. Meier, supra,* this Court said:

> The burden is on the District Court to elucidate the reasons necessitating any departure from the goal of population equality, and to articulate clearly the relationship between the variance and the state policy furthered.
>
> * * *
>
> We hold today that unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and,

> as well, must ordinarily achieve the goal of population equality with little more than *de minimus* variation. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.

420 U.S. 1, at 25 and at 27-28.

The Court of Appeals adopted the Lichtman plan despite the substantial population deviations shown above. That action demonstrates a failure on the part of the Court of Appeals to make a good faith effort in meeting the one man - one vote requirements. See, *Kirkpatrick v. Preisler,* 394 U.S. 526, 89 S.Ct. 1225 (1969). Further, although the Court of Appeals had a duty to explain or justify the population deviations which could have been avoided, as evidenced by the Trial Court's plan and the plan submitted by the School Board, it failed to do so. This Court has made it clear that the burden of explaining population deviation is on the court imposing the plan. This Court has also made it clear that such deviations will not be permitted absent compelling and legitimate state policy considerations. The Court of Appeals simply failed to satisfy these burdens. See, *Chapman v. Meier, supra.*

In *Swann v. Adams, supra,* this Court rejected a Trial Court's plan where the Trial Court failed to explain or justify variations in population. The Court said simply:

> As this case comes to us we have no alternative but to reverse. The District Court made no attempt to explain or justify the many variations among the legislative districts. As for the State, all it suggested in either the lower court or here is that its plan comes as close as "practical" to complete population equality and that the State was attempting to follow congressional district lines. There was, however, no attempt to justify any particular deviations, even the larger ones, with respect to either of these considerations.

385 U.S. 440, at 445.

We submit that the conduct of the Court of Appeals in this case, when considered in light of *Swann,* requires summary reversal.

CONCLUSION

For the reasons given above, Petitioners respectfully request that this Petition be granted.

/s/ John E. Pilcher

/s/ J. Garrison Thompson

/s/ Cartledge W. Blackwell, Jr.

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 78-0578-BH

United States of America,
Plaintiff,

vs.

Dallas County Commission, et al.,
Defendants.

ORDER

This cause came on for oral arguments on April 22, 1987 relative to the objections raised by the Government in its critique of the Court's proposed districting plan of March 10, 1987. The Government objects to the Court's proposed plan on the singular ground that the inclusion of the probate judge, who is elected at-large, as a voting member of the Dallas County Commission, does not fully cure the violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, in this case.[1]

The Government first argues that the Dallas County Commission plan should entirely correspond to the yet to be approved or adopted plan submitted by the Dallas County School Board, which the Government anticipates will consist of five single-member districts, to avoid voter confusion and to ease the administration and conduct of elections. The Court, however, concludes that it would be inappropriate to predicate a decision

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[1] The Government concedes that the four single-member districts incorporated in the Court's proposed plan "appear to offer black and white citizens an equal opportunity for effective political participation insofar as those four seats on the commission are concerned."

regarding the legality of the County Commission plan primarily upon the anticipated design of a separate and district governing body's districting plan.

The Court must also take issue with the Government's adamant contention that the finding of a Section 2 violation as to the Dallas County Commission, in and of itself, mandates the removal of all existing at-large seats on the commission. The Court must again reject such a contention as it did by order of August 8, 1986 in *United States v. Marengo County Commission,* 643 F. Supp. 232 (S.D. Ala. 1986), to-wit:

> The Court rejects plaintiffs' invitation to hold that a liability ruling such as was entered in this case automatically dictates the eradication of all at-large seats for governing bodies. Such an interpretation of the exception set forth in [*Edge v. Sumter County School District,* 775 F.2d 1509 (11th Cir. 1985)] would inihilate (sic) a court's ability to examine on an ad hoc basis the totality of the circumstances presented and thereby to fashion an equitable remedy which does not intrude upon state policy any more than is necessary to meet the specific constitutional violations involved. [*Upham v. Seamon,* 456 U.S. 37, 102 S. Ct. 1518, 71 L. Ed. 2d 725 (1982)], citing *Whitcomb v. Chavis,* 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971).

643 F. Supp. at 235. While it is true that in *Marengo County, supra,* the Court found no rationale for maintaining the at-large chair with respect to either the Marengo County Commission or the Marengo County Board of Education, the Court was not confronted in that case, as it is here, with a situation in which the Alabama legislature has statutorily designed the probate judge of the county to chair and be a member of the county commission. Despite the Government's protestations to the contrary, this does not constitute a distinction without significance.

In this regard, the Government argues that, while the at-large election of the probate judge is justified because the duties of this single-person office are uniquely executive/judicial, there exists no justification for persons elected to the probate judgeship position to operate in a representative capacity. The Government also argues that such a grant of authority to operate in a representative capacity does not represent state policy inasmuch as only 33 of 67 counties in Alabama come within the auspices of statutes such as 1901 Ala. Acts 328. The Court, however, is in no position to declare, based on the evidence of record in this case, that no rational basis exists for the Alabama Legislature's decision to authorize the probate judge of certain Alabama counties, many of which are rural counties, to wear essentially two hats. Obviously, the Government seeks to have this Court question the legislature's wisdom regarding its decision to utilize one elected official in such counties in two governmental capacities, without contending that the legislature lacked authority to so legislate. This the Court cannot do. Therefore, the Court shall not attempt to second guess the legislature on this matter. The Court further notes that the Government does not contend that the laws pursuant to which the probate judge of the 33 versus 34 Alabama counties were granted representative as well as executive/judicial duties have been significantly altered since their inception, particularly as such a law has been applicable to Dallas County.

The Government's remaining arguments are obviously directed at the principal issue now before the Court: whether the Court's proposed plan remedies the Section 2 violation in this case in the least intrusive manner possible under the circumstances. The Government argues that the position of probate judge is beyond the reach of black voters and thus future elections to this position will not attract black candidates or encourage large black voter turnout. The Government further argues that elections to this position will not produce someone at all inclined to be responsive to black voter interests. The Government further surmises that given two black majority

districts and two white majority district, the probate judge, a person not responsive to black voter interests, will likely be casting a deciding vote more frequently than in the past, thus elevating his position to the most important and powerful member of the commission. Consequently, the Government proposes that the probate judge be removed from the commission and that, in his stead, a fifth member be selected from a fifth single-member district designed in such a manner as to constitute a "swing" district.[2]

The Court must at the outset take serious exception to the Government's contention that elections to the position of probate judge will not produce someone at all inclined to be responsive to black voter interests. Such a characterization is clearly not supported by the evidence of record. *See, e.g., United States v. Dallas County Commission,* 789 F.2d 1529, 1540 (11th Cir. 1984) (After reviewing the entire record, the court concluded that the district court's finding that the commission is responsive to the needs of blacks is not clearly erroneous.). The record does support, however, this Court's finding, left undisturbed by the Eleventh Circuit, that:

> Probate Judge John W. Jones, Jr. was originally elected in the May 4, 1976 Democratic Primary winning without a runoff against two white and one black opponents. In that race it is evident that Judge Jones received a substantial number of black votes, even though he was then opposed by Mr. Samson Crum, a major political leader within the black community.

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[2] The Government adheres to its proposal that an additional member of the commission be selected from a fifth single-member district even if the Court should ultimately decide not to remove the probate judge as chairman, thus converting the commission membership to six. A further proposal involves a similar six member commission, but advocates that the probate judge be relieved of his voting power in part or entirely.

United States v. Dallas County Commission, 548 F. Supp. 875, 903 (S.D. Ala. 1982). The Court also finds that the Government's evidence, presented at the post remand hearing held February 24-28, 1986, confirms that Judge Jones won reelection in 1982 by receiving 70% of the black vote and 87% of the white vote. (Government's Exhibit B-4 at p. 9). The fact that Judge Jones, the incumbent candidate, ran unopposed by a black candidate in 1982 cannot diminish the significance of the black support he obviously garnered before and maintained since his 1976 election.

The Court is aware that the evidence relative to Judge Jones' election and reelection does not render insignificant the conclusion that the at-large scheme of election for the Dallas County Commission, as a whole, is violative of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. This evidence, however, does raise a crucial question as to the appropriateness of generalizing certain findings and conclusions when faced with a unique situation involving one specific seat on a five member governing body. This is particularly true in this case, with respect to the probate judgeship position, in light of the Government's proposed remedy.

The Government here proposes the creation of a fifth single-member district designed to constitute a "swing" district. The Government refers specifically as an example to the five single-member district plan adopted by this Court in *United States v. Marengo County Commission, supra,* 643 F. Supp. at 232. The *Marengo County* plan produced:

> [T]wo districts with substantial black voter majorities of 72.5% and 69.1%; one district with a substantial white voter majority of 73.6%; one district with a slight white voter majority of 57.0%; and one district with a slight black voter majority of 56.6%.

643 F. Supp. at 233. In comparison to certain districts comprising the *Marengo County* plan, the plan now under considera-

tion for the Dallas County Commission produces: two districts with substantial black voter majorities of 75.8% and 67.2%; one district with a substantial white voter majority of 68.8%; and one district with a slight white voter majority of 55.2%. In addition, the Dallas County Commission plan calls for the at-large election of the probate judge from a county in which the Government concedes that the black citizens comprise 54.5% of the general population and 49.8% of the voting age population.

Upon careful consideration of the Dallas County Commission plan in comparison with the *Marengo County* plan, the Court is frankly at a loss to understand the Government's rationale for substituting a single-member "swing" district for what amounts to the county-wide district proposed by the Court. The Court's proposed at-large district is comprised of a general population which is 54.5% black and a voting age population which is 49.8% black. A single-member district similarly constituted would in fact be considered a swing district and would, in combination with four additional single-member districts comparable to those now proposed by the Court, constitute a fair election plan.

The Court at this juncture must note that the Government continues to contend that the winner of a swing district or any district with less than a 65% black voter majority is more likely to be a white candidate than a black candidate. The Court finds such a contention to be not only highly speculative, but to expand the meaning and intent of the Voting Rights Act beyond permissible limits. As applied to this case, however, it is apparent that if the Government's hypothesis is correct, the creation of the Government's proposed "swing" district will not alter the results presently anticipated and ascribed by the Government to the Court's plan. Rather, the Government's proposal, at best, would merely alter the individuals involved.

It is, therefore, apparent that under the unique circumstances of this case, the Court's plan is a fair election plan for the Dallas

County Commission. There exists no evidence to support the Government's contention, given a 54.5% majority in the general population and a 49.8% constituency among the voting age population of Dallas County and given that black voters constitute a substantial majority in two single-member districts and that such voters will also vote for the probate judge, that the position of probate judge will not attract black candidates or encourage large black voter turnout.[3] It is also apparent that, should the Court set aside its present plan and draw a plan as proposed by the Government, the citizens of Dallas County, both black and white, would thereafter be required to assume the burden of compensating an additional elected official, a situation not at issue in *Marengo County* and clearly not necessary under the unique facts of this case.

For the reasons set forth above, it is ORDERED, ADJUDGED and DECREED that the Court's proposed plan of March 10, 1987, a copy of which is appended hereto,[4] be and is hereby ADOPTED as the plan under which future elections for the Dallas County Commission are to be conducted. Accordingly, it is ORDERED that the defendants, the Dallas County Commission: Chairman John W. Jones, Jr. and members Deans E. Barber, Jr., William H. Kendrick, C. Stanley Baldwin, James S. Wilkinson; Earl Goodwin, Chairman of the Dallas County Democratic Executive Committee; and John J. Grimes, Chairman of the Dallas County Republican Executive Committee, be and are hereby DIRECTED to conduct the elections for the

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[3] It is inconceivable to this Court that, given (1) the potential to effect the outcome of any election in District 2 of the Court's plan by virtue of a population base of 44.4% versus only 55.2%; and (2) the potential to effect the election of probate judge, black citizens in District 2 would lack motivation to participate actively in the political process.

[4] Inasmuch as the parties have already been provided a copy of the Court's plan, no duplicate copies shall accompany this order.

members of the Dallas County Commission pursuant to the plan adopted herein and in accordance with applicable state and local law during the general election to be held in November, 1988.

The Court is of the opinion that, in light of the proximity of the 1988 general election, little benefit would be served by compelling the Dallas County citizens to incur the expense of a special election. However, in the event that a county-wide election is scheduled for another purpose prior to the 1988 general election, the Court will entertain a motion to advance elections relative to the Dallas County Commission.

DONE this 21st day of May, 1987.

/s/ W. B. Hand
Chief Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 78-0578-BH

United States of America,
Plaintiff,

vs.

Dallas County Commission, et al.,
Defendants.

ORDER

This cause came on for hearing before the Court on October 2, 1987 to address the Court's proposal to implement as to the Dallas County School Board the election plan previously adopted with respect to the Dallas County Commission. The Court's proposed plan consists of four single-member districts of which two districts contain black voter majorities of 75.8% and 67.2%; one district contains a white voter majority of 68.8% and one district contains a slight white voter majority of 55.2%.[1] In addition to the four single-member districts, a member of the School Board shall, under this plan, be elected at-large but shall not, in contrast to the Commission plan, be automatically designed as the chairman of the school board.

The Government objects to the Court's proposal on the singular ground that the Court's plan includes a member on the

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[1] The maximum population deviation under this plan with respect to the single-member districts is only 2.97%.

School Board who is elected at-large.[2] The Government does not abandon its contention that the election plans for the County Commission and School Board ought to be uniform in order to avoid voter confusion and to ease the administration and conduct of elections. Rather, the Government continues to assert, in essence, that because the unique circumstances which justify, in this Court's opinion, the continued inclusion of the at-large elected probate judge as a voting member of the County Commission without increasing that governing body's membership do not exist with respect to the School board, the County Commission plan should be made to conform to a School Board plan of five single-member districts. In other words, the Government asserts that despite the present legality and fairness of the plan as applied to the County Commission, possible voter confusion and administrative difficulties constitute sufficient rationale to drastically alter the Commission's composition to conform with the Government's perceived requirement of a five single-member districting plan for the School Board, but cannot under any circumstance serve as a rationale for the reserve, i.e., conformity of a School Board plan to the otherwise justified Commission plan. The Court finds the Government's logic on this point perplexing, but will not belabor the issue.

As this Court stated in its order of September 19, 1987, it is evident that neither the potential for voter confusion and administrative difficulties nor the time constraints now imposed upon the Courts by virtue of the delay in receiving notice that the School Board's proposed plan had been denied preclearance would, in and of themselves, render the Court's County Commission plan appropriate for implementation as to the School

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[2] The Government previously conceeded that the four single-member districts incorporated in the Court's plan "appear to offer black and white citizens an equal opportunity for effective political participaion insofar as those four seats on the commission are concerned."

Board. However, despite the Government's protestations to the contrary,[3] the county-wide district incorporated in the Court's plan statistically constitutes a swing district under the particular circumstances of this case.[4] *See e.g., United States v. Dallas County Commission,* 661 F. Supp. 955, 958-59 (S.D. Ala. 1097) (comparison of the Marengo County and Dallas County Commission plans). The Court, therefore, concludes that the potential for voter confusion and administrative difficulties, when taken in combination with the overall features of the Court's County Commission plan, justifies the implementation of the same plan as to the School Board. The Court concludes that the County Commission plan is, under the circumstances, a fair election plan for the Dallas County School Board.

The Court has reviewed the two examples of five single-member districting plans admitted into evidence by the Government and contrasted the same with the Court's plan. The first plan (Government's Exhibits #5 and #6) was drafted by Joe L. Reed as Chairman of the Alabama Democratic Conference, an organization described by Mr. Reed as a caucus of black democrats in the state. Mr. Reed, during his testimony, critized the Court's inclusion of an at-large district in its Dallas County plan, inter alia, on the ground that it is much easier for a black candidate to run for office in a compact district than county-wide because it is easier to become known and takes less money

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[3] The Government continues to insist that the finding of a Section 2 violation, in and of itself, mandates the removal of all existing at-large seats on the School Board. This Court has addressed this contention on several previous occasions and incorporates those opinions on this issue by reference herein. United States v. Dallas County Commission, 661 F. Supp. 955, 957 (S.D. Ala. 1987), quoting United States v. Marengo County Commission, 643 F. Supp. 232, 235 (S.D. Ala. 1986).

[4] Dallas County is comprised of a general population which is 54.5% black and a voting age population which is 49.8% black.

to run a campaign in a smaller area. The Court cannot help but note, however, that among Mr. Reed's five districts, three are considerably larger geographically than two with one black majority district apparently constituting more than half the County geographically. The Court also observes that, contrary to the Government's position that a fifth district should be included in the Court's plan and that such a district should be designed as a swing district, Mr. Reed's plan does not, by his own admission, contain a swing district. Mr. Reed's plan consists of two districts with white voter majorities of 79.79% and 69.63% and three districts with black voter majorities of 88.69%, 67.55% and 68.46%. Mr. Reed admitted that the three districts of at least 67% black majority would likely result in the election of black candidates and were therefore "safe" black districts.

The second plan (Government's Exhibits #8 and #9(a) and (b), admitted into evidence without objection after the October 2, 1987 hearing was drafted by Dr. Allan J. Lichtman. In contrast to Mr. Reed's plan, Dr. Lichtman's plan does purport to include a swing district containing a black voter majority of 61.3%. The Court is at odds to understand, however, what true distinction lies between a swing district of 61.3% black majority carved geographically out of a county, and a single-member county wide district of 59.4% black majority, beyond a possible change in the identity of the candidate occasioned merely by the candidate's particular residence. Surely a 1.9% difference between these two forms of a black majority swing district cannot constitute a statistically significant difference. The Court must also observe that, like Mr. Reed's plan, Dr. Lichtman's plan incorporates a black majority district which geographically comprises more than half the county and, therefore, appears to contradict the argument that only single-member districts can encourage black candidate participation because it is easier to become known and takes less money to run for office.

As to both plans admitted by the Government, the Court is troubled by the idea that at least two members of the five

member School Board would be elected by, and therefore represent the interest of, only citizens residing in the City of Selma,a city which has its own independent school system.[5] A third district in Dr. Lichtman's plan also appears to contain a predominant number of city residents and certainly cannot be said to extend much into any rural segment of Dallas County. The Court's plan certainly provides a means for more adequate representation of the citizens of Dallas County as a whole on both their County Commission and their County School Board.

It is, therefore, ORDERED, ADJUDGED and DECREED that the Court's proposed plan of March 10, 1987, a copy of which has already been provided to the parties, be and is hereby ADOPTED as the plan under which future elections for the Dallas County School Board are to be conducted. Accordingly, it is ORDERED that the defendants, the Dallas County School Board: Chairman, John J. Grimes, Jr. and members William R. Martin, Harold Joe Bradford, Dr. Catherine Bozeman, Elton R. Ralston; Earl Goodwin, Chairman of the Dallas County Democratic Executive Committee; and John J. Grimes, Chairman of the Dallas County Republican Executive Committee, be and are hereby DIRECTED to conduct elections for the members of the Dallas County School Board pursuant to the plan adopted herein and in accordance with applicable state and local law during the general election to be held in November, 1988. It is FURTHER ORDERED that, following the first election, the members of the newly constituted Dallas County School Board shall elect among themselves a chairman. The Court shall not intrude further into the legislative functions of

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[5] Inasmuch as no issue has been raised regarding the participation of city residents in the election of the County School Board, the Court assumes that city residents have a sufficient interest in the county school system to justify their participation in this election. However, the Court doubts that their interest would equate with virtual control of the County School Board.

the School Board and shall leave to the devises of this entity the responsibility to determine what, if any, rotation in the chair shall occur.

As indicated with respect to the Dallas County Commission, 661 F. Supp. at 959, the Court is of the opinion that, in light of the proximity of the 1988 general election, little benefit would be served by compelling the Dallas County citizens to incur the expense of a special election. However, in the event that a county-wide election is scheduled for another purpose prior to the 1988 general election, the Court will entertain a motion to advance elections relative to the Dallas County School Board as well as the Dallas County Commission.

DONE this 23rd day of October, 1987.

/s/ W. B. Hand
Chief Judge

APPENDIX C

United States of America,
Plaintiff-Appellant,

Samson Crum, Sr., Edwin Moss, Frederick D. Reese, Clarence Williams, on behalf of themselves and all others similarly situated, Movants-Appellants,

v.

Dallas County Commission, Dallas County, Ala.; Jones, John W., Jr., Chairman; Deans E. Barber, Jr., William H. Kendrick, C. Stanley Baldwin, James S. Wilkinson, Members, Earl Goodwin, Chairman of the Dallas County Democratic Executive Committee and John J. Grimes, Chairman of the Dallas County Republican Executive Committee, Defendants-Appellees,

Dallas County Board of Education, et al., Defendants.

No. 87-7459.

United States Court of Appeals,
Eleventh Circuit.

July 13, 1988.

In vote dilution action concerning election of members to county school board and county commission, the United States District Court, for the Southern District of Alabama, No. 78-0578-BH, William Brevard Hand, Chief Judge, 671 F.Supp. 1337, adopted remedial election plan. Appeal was taken. The Court of Appeals, Hatchett, Circuit Judge, held that the District Court's Judge, held that the District Court's remedial plan for election of members to the county commission violated the Voting Rights Act.

Reversed, vacated, and remanded with directions.

Hill, Circuit Judge, concurred specially and filed statement.

Floyd R. Gibson, Senior Circuit Judge, sitting by designation, dissented and filed statement.

Marie Klimesz McElderry, U.S. Dept. of Justice, Civil Rights Div., Jessica Dunsay Silver, Wm. Bradford Rynolds, U.S. Dept. of Justice, Civil Rights Div., Washington, D.C. for U.S.

Larry T. Menefee, James U. Blacksher, Birmingham, Ala., Neil Bradley, American Civil Liberties Union, Laughlin McDonald, Atlanta, Ga., for intervenors-appellants Crum, Moss, Reese, William, et al.

John E. Pilcher, Pilcher & Pilcher, P.C., Selma, Ala., for Dallas Co. Bd. of Educ., Grimes, Martin, Bozeman, Ralston and Bradford.

Cartledge W. Blackwell, Jr., Blackwell & Keith, Selma, Ala., J. Garrison Thompson, Pitts, Pitts & Thompson, Selma, Ala., for Dallas Co. Comm., Dallas Co., Ala., Jones, Barber, Kendrick, Baldwin and Wilkinson.

Appeal from the United States District Court for the Southern District of Alabama.

Before HILL and HATCHETT, Circuit Judges, and GIBSON*, Senior Circuit Judge.

HATCHETT, Circuit Judge:

This appeal is a companion case to *United States v. Dallas County Commission,* No. 87-7766, 850 F.2d 1433 (11th Cir.1988). In No. 87-7766, we held that the district court's remedial plan for election of members to the Dallas County Board of Education does not comply with section 2 et seq. of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973 et seq.

In this appeal, the sole question presented is whether a similar election plan adopted by the district court with respect to the

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Dallas County Commission, is likewise infirm under section 2 of the Voting Rights Act. *See United States v. Dallas County Commission,* 671 F.Supp. 1337, 1339-40 (S.D.Ala.1987).

The Dallas County Commission was created by Act No. 328 of the Alabama Legislature of 1900-1901. The Act provided for four commissioners to be elected at-large from residency districts and for the county probate judge, also elected at-large, to serve as ex-officio chairman of the Commission. The probate judge's sole duty as ex-officio chairman is to preside over the Commission's meetings and to cast a vote in the event of a tie. The probate judge is elected to a six-year term, while the other four members of the Commission are elected to concurrent, four-year terms.

The government objects to the district court's election plan on the ground that inclusion of the probate judge as a voting member of the Commission, to be elected at-large, does not fully cure the section 2 violation we previously declared. *See United States v. Dallas County Commission,* 636 F.Supp. 704 (S.D.Ala.1986) (holding that the at-large election scheme utilized in election of members to the County Commission violates section 2).[1] The government contends that a single-member district plan containing a *fifth* swing district in lieu of the probate judge's at-large seat would provide an adequate remedy for the section 2 violation. The county contends that the district court's plan is consistent with longstanding policy in Dallas County favoring a countywide election of the probate judge, and hence should not be disturbed by this court, in the absence of statutory or constitutional infirmities.

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[1] The government urges, and we agree, that the at-large election of the probate judge is permissible under the Voting Rights Act with respect to the judicial aspects of that office. *See Butts v. City of New York,* 779 F.2d 141, 148 (2d Cir. 1985), *cert. denied,* ____ U.S. ____, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986).

[1, 2] We agree with the county that when devising election plans, federal courts should defer to state legislative policy and modify the state's plan only to the extent necessary to cure statutory or constitutional defects. *Upham v. Seamon,* 456 U.S. 37, 41-43, 102 S.Ct. 1518, 1521-1522, 71 L.Ed.2d 725 (1982); *Edge v. Sumter County School District,* 775 F.2d 1509, 1512 (11th Cir.1985). This rule does not obtain, however, in this case where we have already determined that the court-drawn election plan does not fully cure the infirmities which caused the district court in first instance to declare the county's at-large electoral system violative of section 2. *United States v. Dallas County Commission,* No. 87-7766, 850 F.2d 1433 (11th Cir.1988).

Accordingly, for the reasons expressed in No. 87-7766, the remedial plan drawn by the district court for election of members to the Dallas county Commission does not comply with section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The district court's order adopting an election plan, pursuant to which the county is divided into two predominantly black and two predominantly white single-member districts, with the probate judge, to be elected at-large, serving as chairman ex-officio of the Commission, is VACATED. The case is remanded to the district court for the sole purpose of directing the members of the Dallas County Commission to conduct elections for the members of the County Commission pursuant to the Lichtman plan adopted by this court in No. 87-7766 and in accordance with applicable state and local law during a primary election to be hereafter scheduled and the general election to be held in November, 1988. The order of this court granting the government's motion for a stay pending appeal of the elections for the Dallas County Commission scheduled for June 7, 1988, and also tolling the qualification period for candidates, is hereby VACATED. The district court shall comply with the mandate of this court in an expeditious manner.[2]

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[2] The court is aware that its adoption of a five single-member district plan results in the creation of an additional elected official.

REVERSED, VACATED, AND REMANDED WITH DIRECTIONS.

HILL, Circuit Judge, concurring specially:

I concur in the judgment for the reasons stated in my special concurrence filed today in the case of 87-7766—*United States of America v. Dallas County Board of Education, et al,* 850 F.2d 1433.

FLOYD R. GIBSON, Senior Circuit Judge, dissenting:

I respectfully dissent for the reasons stated in my dissenting opinion filed today in the case of 87-7766—*United States of America v. Dallas County Board of Education, et al,* 850 F.2d 1433.

APPENDIX D

United States of America,
Plaintiff-Appellant,

Samson Crum, Sr., Edwin Moss, Frederick D. Reese, Clarence Williams, on behalf of themselves and all others similarly situated, Movants-Appellants.

v.

Dallas County Commission, Dallas County, Alabama, et al., Defendants,

Dallas County Board of Education, John J. Grimes, Jr., William R. Martin, Harold Joe Bradford, Dr. Catherine Bozeman, Elton R. Ralston, Members, Earl Goodwin, Chair man of the Dallas County Democratic Executive Committee, and John J. Grimes, Chairmanof the Dallas County Republican Executive Committee, Defendants-Appellees.

No. 87-7766.

United States Court of Appeals,
Eleventh Circuit.

July 13, 1988.

Government appealed from decision of the United States District Court for the Southern District of Alabama, William Brevard Hand, Chief Judge, 671 F.Supp. 1337, imposing court-ordered election plan for county board of education. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) election plan providing for four single-member districts, two of which contained black voting majorities and two of which contained white voting majorities and one at-large election district did not provide proper remedy for violation of Voting Rights Act of 1965, and (2) Court of Appeals would approve plan proposed by Government expert which would provide for five single-member districts composed of two with black voting majorities, two with white voting majorities and one "swing" district which contained black voting majority of over 60%.

Affirmed in part, reversed and vacated in part, and remanded with instructions.

Hill, Circuit Judge, concurred specially and filed an opinion.

Floyd R. Gibson, Senior Circuit Judge, sitting by designation, dissented and filed an opinion.

Larry T. Menefee, Birmingham, Ala., Neil Bradley, American Civil Liberties Union Foundation, Inc., ATlanta, Ga., Marie Klimesz McElderry, U.S. Dept. of Justice, Jessica Dunsay Silver, Civil Rights Div., J. Gerald Herbert, U.S. Dept. of Justice, William Bradford Reynolds, Voting Section, Gerald W. Jones, Civil Rights Div., Paul F. Hancock, Washington, D.C., J.B. Sessions, U.S. Atty., Mobile, Ala., for plaintiff-appellant.

Cartledge W. Blackwell, Jr., Blackwell & Keith, Selma, Ala., for Dallas County Comn., et al.

John E. Pilcher, Pilcher & Pilcher, P.C., Selma, Ala., for Dallas County Bd. of Ed., et al.

Appeal from the United States District Court for the Southern District of Alabama.

Before HILL and HATCHETT, Circuit Judges, and GIBSON*, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this vote dilution suit, the United States appeals from a final judgment imposing a court-ordered election plan for the Dallas County Board of Education (School Board) (Alabama). The final judgment followed the district court's finding that the

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

School Board's at-large electoral system impermissibly diluted black voting strength, in violation of section 2 et seq. of the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq., as amended. Because we find that the district court's remedial plan is insufficient to cure the violation, we reverse.

BACKGROUND

Dallas County is located in south-central Alabama and ranks eleventh in size of Alabama counties. Much of the county's population resides in Selma, the county's major municipality. According to the 1980 census, the county had a population of approximately 50,000 residents. Black persons comprised approximately 55-percent of the total population, 49-percent of the voting age population, and 44.8-percent of the registered voters. The most recent voter registration statistics in the record (1984) indicate that 37,232 persons were register, of whom 18,043 were black (48.46 percent), and 19,189 (51.54-percent) were white.

The members of the Dallas County Board of Education are elected pursuant to Chapter 8 of Title XVI of the 1975 Code of Alabama and other laws of the state of Alabama generally governing elections. Under an option of Alabama Code § 16-8-1, the School Board is comprised of five members who are elected at-large from numbered posts for six-year staggered terms. *See* Ala.Code §§ 16-8-1 and 16-8-2.

Although the Dallas County Public School System, which encompassess all of Dallas County outside the city of Selma, has a predominantly black pupil enrollment, no black candidate has defeated a white candidate for a position on the School Board since Reconstruction. As found by the district court, black persons in the county are on average both economically and culturally less advanced than white persons, and have suffered intentional, subtle, and pervasive discrimination through legal and economic means.

The United States commenced this vote dilution suit ten years ago in October, 1978, alleging that the at-large method of electing officials to the Dallas County Commission (County Commission) and Dallas County Board of Education (School Board) impermissibly diluted black voting strength in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended, and the fourteenth and fifteenth amendments. As to the School Board, the government contended that Alabama Code § 16-8-1, which provides for at-large school board elections in thirty-five Alabama counties, including Dallas, had been unconstitutionally applied.

The case was originally tried in 1979 and 1980 under the standards articulated by the former Fifth Circuit in *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir.1973) (in banc), *aff'd on other grounds sub nom. East Carroll Prish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976). At the close of the government's evidence, the School Board moved for an involuntary dismissal pursuant to Fed.R.Civ.P. 41(b). This motion was still pending when the Supreme Court rendered its decision in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

In *Bolden,* a majority of the Court extended the discriminatory intent requirement for fourteenth amendment equal protection violations under *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) and its progeny, to challenges under the Voting Rights Act. After receiving briefs from the parties on the impact of *Bolden,* the district court dismissed the School Board from the suit on July 31,

1981.[1] The court did not, however, enter final judgment on the merits until September 3, 1982. At that time, the district court entered judgment for the School Board and against the United States. *United States v. Dallas County Commission,* 548 F.Supp. 794 (S.D.Ala.1982).

On appeal, we affirmed in part, vacated in part, reversed in part, and remanded for further proceedings. *See United States v. Dallas County Commission,* 739 F.2d 1529 (11th Cir.1984). We held that the district court was clearly erroneous in finding that racial polarization in voting was not a significant factor in the consistent defeat of black candidates. *Dallas County,* 739 F.2d at 1536. We also held that the district court was clearly erroneous in ruling that the requirement that candidates run from numbered posts did not militate in favor of a finding of dilution. *Dallas County,* 739 F.2d at 1537. Consequently, we reversed and remanded for further consideration. *Dallas County,* 739 F.2d at 1537.

On remand, the district court granted the School Board's motion for severance from the Commission portion of the case. The government then moved for a preliminary injunction against primary elections scheduled for June, 1986 for both the Commission and the School Board. The district court denied the motion, reasoning that our 1984 decision "left undisturbed the critical [f]indings of [f]act and [c]onclusions of [l]aw ... of

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[1] Trial continued against the County Commission. After the evidence was concluded but before the case was decided, yet another intervening change in the law occurred. In response to the Supreme Court's decision in *Mobile,* Congress amended section 2 of the Voting Rights Act "to make clear that proof of discriminatory intent is not required to establish a violation of Section 2." S.Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S.Code Cong. & Adm.News 177, 179. After section 2 was amended, the Commission did not request that additional evidence be taken. Judgment was ultimately rendered in favor of the Commission on September 10, 1982. *United States v. Dallas County Commission,* 548 F.Supp. 875 (S.D.Ala. 1982).

th[e] [district] court's determination that judgment on the merits should be rendered in favor of the School Board."[2]

The government appealed. On appeal, we held that although we affirmed the district court's decision as to the constitutionality of section 16-8-1, our 1984 decision "did not affirm the 1982 judgment entered by the district court with respect to § 2 of the Voting Rights Act as it pertains to the School Board." *United States v. Dallas County Commission,* 791 F.2d 831, 832 (11th Cir.1986). Accordingly, we again reversed and remanded with directions that the district court grant the government's motion for a preliminary injunction against the upcoming School Board elections. *Dallas County,* 791 F.2d at 833.

Shortly after our decision directing the court to enjoin the School Board elections, the district court entered judgment in favor of the United States and against the County Commission defendants, declaring the at-large method of electing members to the Commission violative of section 2 of the Voting Rights

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[2] In a separate order entered on March 6, 1986, the district court granted the government's motion for a preliminary injunction barring elections for members of the County Commission pending final resolution of the lawsuit.

Act. *United States v. Dallas County Commission,* 636 F.Supp. 704 (S.D.Ala.1986).[3]

Thereafter, on September 29, 1986, the district court conducted a post-remand evidentiary hearing regarding the School

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[3] In accordance with the district court's order, the county submitted a proposed election plan both to the court and the Attorney General, the latter submission being for the purpose of preclearance under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The plan provided for the election of four commissioners from single member districts and for the at-large election of the probate judge, who would continue to serve as ex-officio chairman of the Commission, as provided by Alabama law. The racial composition and population of the four single-member districts of the county's proposed plan is set forth below:

DISTRICT	TOTAL POP.	WHITE	BLACK
1	13,377	35.7%	63.2%
2	13,745	55.2%	44.4%
3	13,344	68.8%	31.5%
4	13,515	20.2%	78.8%

On June 2, 1986, the Attorney General objected to the county's plan and denied preclearance. The gravamen of the Attorney General's objection was that the county's plan, which fragmented an area of the black community between two districts, was enacted with the intent to deny or abridge black citizens' right to vote.

Consequently, on March 10, 1987, the district court undertook the task of drawing its own election plan for the County Commission. Similar to the county's plan, the court's plan contains two white electoral majority districts and two black electoral majority districts. In addition, the court's plan retains the probate judge, who would be elected at-large, as a voting member of the County Commission. Over the objection of the United States and without holding an evidentiary hearing, the district court ordered the plan to take effect as of the November, 1988 general election. *United States v. Dallas County Commission,* 661 F.Supp. 955, 959 (S.D.Ala.1987). As will be discussed *infra,* the court subsequently adopted the same election plan as to the Dallas County Board of Education. *See United States v. Dallas County Commission,* 671 F.Supp. 1337 (S.D.Ala.1987).

Board. The government's evidence consisted primarily of a transcript of the February, 1986 post-remand hearing pertaining to the Commission and exhibits which had been admitted into evidence during that hearing. The School Board offered no new evidence, but adopted the evidence presented by the Commission during the February, 1986 hearing. Finding no evidence producted at the School Board hearing to contradict the evidence upon which it relied in determining that the Commission's at-large election scheme was infirm under section 2, the court adopted its findings and conclusions as set forth in *United States v. Dallas County Commission,* 636 F.Supp. 704 (S.D.Ala.1986) (finding Commission's at-large election scheme violative of section 2). Accordingly, the court concluded that the at-large electoral system utilized in the election of members to the Dallas County Board of Education likewise violated section 2 of the Voting Rights Act.

The court then directed the School Board to prepare a fair election plan and submit it to the court and to the Attorney General for preclearance under section 5 of the Voting Rights Act. Following the court's directive, the School Board submitted a new five single-member district plan to replace the at-large electoral method prescribed by Alabama Code § 16-8-1 (1975).[4] Although the Attorney General precleared the School Board's proposed change from at-large elections to a five single-member

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[4] The racial composition of the five single member districts and the population of each district of the School Board's proposed plan is set forth below:

District	Total Pop.	White Pop.	Black Pop.	% White	% Black
ONE	10,796	3,871	6,512	35.8	60.3
TWO	10,773	6,853	3,521	63.6	32.6
THREE	10,886	7,493	3,285	68.8	30.1
FOUR	10,904	848	9,781	7.7	89.7
FIVE	10,622	5,140	5,442	48.3	51.2

district plan, he objected to the apparent concentration of blacks into one district and the fragmentation of the remaining black population between two other districts. Because he found that the circumstances suggested that the Board's efforts were "motivated, at least in significant part, by racial considerations," the Attorney General concluded that the School Board had not met its burden of demonstrating that the proposed plan would not deny or abridge black citizens' right to vote.

Consequently, the district court proposed to implement the County Commission plan as to the School Board with certain adjustments to accommodate for the exclusion of the probate judge. Following an evidentiary hearing, and over the objection of the government, the district court ordered its Commission plan into effect as to the School Board for the November, 1988 general election. *United States v. Dallas County Commission*, 671 F.Supp. 1337, 1339-40 (S.D.Ala.1987).

The United States appealed. On April 6, 1988, we granted the government's motion to stay the elections pending appeal for the Dallas County Commission and the Dallas County Board of Education scheduled for June 7, 1988, and also to toll the qualification period for candidates, until further order of this court.

ISSUES

The issues on appeal are: (1) whether the district court's remedial plan for election of members to the Dallas County Board of Education complies with section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973; and (2) whether the district court properly denied the motion of the applicants, Samson Crum, Sr., Edwin Moss, Frederick D. Reese, and Clarence Williams, to intervene in this action as plaintiffs pursuant to Rules 24(a) and 24(b), Federal Rules of Civil Procedure.

DISCUSSION

I.

[1] Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C.A. § 1973 (West Supp.1988). "It is clear that any proposal to remedy a Section 2 violation must itself conform with Section 2." *Dillard v. Crenshaw County*, 831 F.2d 246, 249 (11th Cir.1987) (citing *Edge v. Sumter County School District*, 775 F.2d 1509, 1510 (11th Cir.1985)). This principle coincides with legislative intent that when devising election plans to remedy section 2 violations, federal courts "should exercise ... traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S.Rep. No. 417, 97th Cong., 2d Sess. 31, *reprinted in* 1982 U.S.Code Cong. & Adm.News 177, 208.

A.

The district court's proposed election plan consists of four single-member districts, two of which contain black voter majorities of 75.8-percent and 67.2-percent, a third district containing a white voter majority of 68.8-percent, and a fourth district containing a white voter majority of 55.2-percent. In addition to the four single-member districts, the district court's plan also provides for at-large election of the fifth member to the School Board. In contrast to the plan adopted with respect to the County Commission, however, the at-large member of the School Board is not automatically designated chairman of the Board. Instead, designation of the chairman is left to the individual Board members:

	Black	White	Total	% Black	% White
District 1	8,998	4,315	13,377	67.2	32.3
District 2	6,103	7,592	13,745	44.4	55.2
District 3	4,210	9,194	13,344	31.5	68.8
District 4	10,246	3,203	13,515	75.8	23.7

The government objects to the district court's election plan on the principal ground that the court's inclusion of an at-large member on the Board does not provide black voters with an equal opportunity to participate in the electoral process and elect candidates of their choice. The government argues that although blacks would have an opportunity to elect candidates of their choice in two of the four single-member districts, the at-large position is beyond the reach of black voters given the political environment in Dallas County which is dominated by racially-charged concerns. In addition, the government argues that the district court failed to comply with the Supreme Court's teachings in *Wise v. Lipscomb,* 437 U.S. 535, 540, 98 S.Ct. 2493, 2497, 57 L.Ed.2d 411 (1978) that "federal courts, absent special circumstances, [should] employ single-member districts when ... impos[ing] remedial [election] plans...." *Wise,* 437 U.S. at 540, 98 S.Ct. at 2497.

We note that "at-large procedures that are discriminatory in the context of one election scheme are not necessarily discriminatory under another scheme. The Supreme Court has repeatedly said that at-large procedures are not unconstitutional per se." *Dillard v. Crenshaw County,* 831 F.2d 246, 250 (11th Cir.1987) (citing *Rogers v. Lodge,* 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982); *Fortson v. Dorsey,* 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965)). Nonetheless, we also emphasized in *Dillard* that "[t]his court cannot authorize an element of an election proposal that will not with certitude *completely* remedy the Section 2 violation." *Dillard,* 831 F.2d at 252.

[2] We agree with the government that the district court's election plan does not comply with section 2. Evidence adduced during the October, 1987 School Board hearing reveals that many of the concerns which prompted our remand of this case in 1984 continue to exist.[5] *See United States v. Dallas County Commission,* 739 F.2d 1529 (11th Cir.1984) (reversing the district court's findings that racially polarized voting and the structure of the Dallas County election system were not significant factors indicating a dilution of the black vote and directing that the court also reconsider on remand "past discrimination and its lingering effects").

During the October, 1987 hearing, the government offered the testimony of Dr. Allan J. Lichtman. Dr. Lichtman, who testified as an expert witness, expressed the opinion that the court's proposed election plan, particularly the at-large feature, would not provide black voters an equal opportunity to participate fully in the electoral process and elect representatives of

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[5] The district court held an evidentiary hearing on October 2, 1987, for the purpose of entertaining the parties' objections to its proposal to implement as to the School Board the same election plan which it had previously implemented as to the County Commission. *See United States v. Dallas County Commission,* 661 F.Supp. 955 (S.D.Ala.1987).

their choice. Specifically, Dr. Lichtman testified that, contrary to the district court's conclusion, the fifth at-large seat would not be a true "swing" seat, but instead would be a seat in which black voters would be effectively foreclosed from having an equal opportunity to elect candidates of their choice.[6]

Dr. Lichtman's observations were based on two factors. First, racially polarized voting is indigenous to Dallas County. "The surest indication of race-conscious politics is a pattern of racially polarized voting." *United States v. Marengo County Commission,* 731 F.2d 1546, 1567 (11th Cir.), *cert. denied,* 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984). In Dr. Lichtman's words:

> [One] must consider the fact that [Dallas County] is a very highly polarized electorate; that the analyses that I have previously performed show that overwhelmingly blacks vote for black candidates in black versus white contests and whites overwhelmingly vote for white candidates in

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[6] Dr. Lichtman characterized a swing seat as one that would be "up for grabs between candidates that were the choice of the white community and candidates that were the choice of the black community" or a district within which "white voters and black voters have a relatively equal chance of electing candidates of their choice."

Throughout oral argument in this case as well as the briefs submitted by the parties, the fifth at-large seat under the district court's plan has taken on added significance because of the realistic probability that the court's plan would produce, in the parties' words, two "black seats" and two "white seats." This is not surprising given the composition of the district court's plan, which consists of two single-member districts containing black voter majorities of 75.8-percent and 67.2-percent, and two single-member districts containing white voter majorities of 68.8-percent and 55.2-percent. Although we understand the parties' shorthand method of referring to the district court's plan as guaranteeing two "white seats" and two "black seats," in reviewing the district court's plan, we must ensure that this or any other plan guarantees equal *access* to the political process, not equal participation among races.

> black versus white contests. Therefore, in the context of such polarization the ability of whites to muster [votes] at the polls means that white through their solid voting are going to be able to elect a white candidate in [an at-large] district and it would be extremely difficult for blacks to elect a black candidate of their choice in such a district.

The second factor identified by Dr. Lichtman is that Dallas County's black citizens have a more difficult time garnering political strength than whites because of the insurmountable social and economic barriers which separate the races. In rejecting the government's proposal to substitute a single-member "swing" district for the district court's countywide at-large district, the district court reasoned that "[a] single-member district similarly constituted [54.5 percent-black with a 49.8-percent black voting age population] would in fact be considered a swing district and would, in combination with four additional single-member districts comparable to those now proposed by the Court, constitute a fair election plan." *Dallas County,* 661 F.Supp. at 959. We disagree. Because there is a greater proportion of whites than blacks who are of voting age in Dallas County, the at-large district under the court's proposed election plan creates a district which, in fact, has a slight white voter majority in terms of the voting age population.

Although it appears negligible, this disparity is magnified when one considers the fact that black citizens share a vastly lower socio-economic status than do whites in Dallas County, and that black citizens have been the victims of past discrimination. "Past discrimination may cause blacks to register to vote in lower numbers than whites. Past discrimination may also lead to present socio-economic disadvantages, which in turn can reduce participation and influence in political affairs." *Marengo County,* 731 F.2d at 1567; *see also Zimmer v. McKeithen,* 485 F.2d 1297, 1306 (5th Cir. 1973) (in banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976). Our finding is buttressed by the testimony of Dr. Lichtman:

> In my view . . . even if it were part of the single-member district plan, a district with a black overall population of 54.6 percent and a black voting age population of 49.8 percent would not constitute . . . a swing district for the reasons I have already explained in terms of the differences in socio-economic standing of whites and blacks which, of course, translate into differences in the ability of the two races to muster votes at the polls in the context of polarized voting we have in Dallas County. I would consider such a district, even if it were part of a plan, not to be a swing district but to be basically a district in which whites are going to have the ability to elect candidates of their choice.

The district court's proposed election plan does not comply with section 2 of the Voting Rights Act. The evidence reveals: (1) a distinct pattern of racially polarized voting; (2) a complete absence of black officials elected to the Dallas County Board of Education; (3) a history of pervasive racial discrimination that has left blacks in Dallas County economically, socially, culturally, and politically disadvantaged; and (4) an election system which has used mechanisms such as numbers posts and a majority requirement in the primary in such a manner as to cancel the voting strength of minorities. If anything, the district court's election plan, which calls for an at-large election of the fifth member to the School Board, perpetuates rather than ameliorates the inequities which have resulted in an abridgement of Dallas County's black citizens' access to the political process.

Accordingly, we hold that the proposed remedial plan drawn by the district court for election of members to the Dallas County Board of Education does not comply with section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

B.

[3] Having determined that the district court's election plan does not adequately remedy the section 2 violation, the question remains as to the relief which Dallas County's citizens are now

entitled. The government argues that a single-member district plan containing a fifth "swing" district would provide an adequate remedy for the section 2 violation. During the October, 1987 School Board hearing, the government admitted into evidence two voting plans consisting of five single-member districts for the district court's review. These plans were rejected.

One of the plans was drafted by Dr. Lichtman. As mentioned previously, Dr. Lichtman testified that even a single-member district with a black population which mirrored the countywide demographics (54.5-percent total black population and a voting age population which is 49.8-percent black) would constitute a secure white seat rather than a true "swing" district. Dr. Lichtman testified that due to the (1) slight white majority in the voting age population; (2) "vastly higher socio-economic standing" of whites which leads to increased participation in and influence on political affairs; and (3) extreme patterns of racially polarized voting, a single-member district would have to contain a total black population of approximately 61-percent in order to constitute a true "swing" district. Dr. Lichtman's plan which creates "two solid white, two solid black and one swing district," consists of five single-member districts, two of which contain black voter majorities of 72.4-percent and 70-percent; two white voter majority district of 65-percent and 64-percent; and finally a fifth swing district containing a black voter majority of 61.3-percent:

(Total Pop.)	(Black Pop.)	(% Black)
10,455	7,571	72.4%
10,481	7,334	70.0%
11,101	6,800	61.3%
11,480	4,018	35.0%
10,464	8,770	36.0%

The district court rejected Dr. Lichtman's election plan on two grounds, both of which we find clearly erroneous. First, the court reasoned that Dr. Lichtman's swing district was not significantly different from the at-large seat which was contained in the court's proposed plan:

> The Court is at odds to understand, however, what true distinction lies between a swing district of 61.3% black majority carved geographically out of a county, and a single-member countywide district of 59.4% black majority, beyond a possible change in the identity of the candidate occasioned merely by the candidates particular residence. Surely, a 1.9% difference between these two forms of a black majority swing district cannot constitute a statistically significant difference.

Dallas County, 671 F.Supp. at 1339. The district court's finding that there is no "statistically significant difference" between the swing seat in Dr. Lichtman's plan and the proposed at-large seat in the court's plan is based upon a mathematical error. The court erroneously found that the total black population in Dallas County is 59.4-percent and that the difference between the total black population and the 61.3-percent black voter majority in Dr. Lichtman's plan is only 1.9-percent. The total black population of Dallas County, however, is 54.5-percent black, and not 59.4-percent. Thus, the difference between 54.5-percent and 61.3-percent is 6.8-percent, not the 1.9-percent difference found by the court.

The court also took issue with Dr. Lichtman's plan based on its finding "that at least two members of the five-member School Board would be elected by, and therefore represent the interests of, only citizens residing in the City of Selma, a city which has its own independent school system." *Dallas County,* 671 F.Supp. at 1337 (footnote omitted). No evidence in the record supports the district court's finding that candidates elected from single-member districts with a substantial majority of Selma residents would not fairly represent the interests of

residents of other parts of Dallas County. In any event, the district court's plan contains two single-member districts which are substantially dominated by city residents. Given the fact that city voters comprise nearly half of Dallas County's population, it is virtually impossible to devise an election plan which complies with the one-person-one-vote requirement in which city residents would dominate in only one district. Finally, the district court's finding that "[a] third district in Dr. Lichtman's plan also appears to contain a predominant number of city residents" is also clearly erroneous. Review of Lichtman's plan shows that city residents comprise a majority in only two of the five proposed single-member districts.

C.

Two years ago, on May 23, 1986, this court summarily ordered the enjoining of the June, 1986 School Board elections. *United States v. Dallas County Commission,* 791 F.2d 831, 833 (11th Cir. 1986). More recently, on April 6, 1988, we granted the government's motion for a stay pending appeal of the elections for the County Commission and School Board scheduled for June 7, 1988. In that same order, we tolled the qualification period for candidates until further order of this court.

Although we would ordinarily remand this case with directions that the district court implement an election plan which fully complies with section 2, we are mindful that we "should exercise [our] traditional equitable power to fashion . . . relief so that it *completely* remedies the prior dilution of minority voting strength and *fully* provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S.Rep. No. 417, 97th Cong., 2d Sess. 26, *reprinted in* 1982 U.S. Code Cong. & Adm.News 177, 208 (emphasis added). In fashioning this relief, we do not take lightly the fact that the School Board has had ample opportunity to devise an election plan which cures the section 2 violation.

Additionally, we are unaware of any reason to again remand for further proceedings. The five single-member district plan devised by Dr. Lichtman vindicates the rights of Dallas County's black citizens whose opportunity to effectively participate in the election process has been denied. Because of this lawsuit, all the citizens of Dallas County have been denied the right to govern their affairs. How long may a court of the United States allow the rights of citizens to be trampled through preclearance defaults and litigation plans? It is time for an election in Dallas County!

Accordingly, the district court's remedial plan for election of members to the Dallas County Board of Education is VACATED. The case is remanded to the district court with direction that it order the Dallas County Board of Education to conduct elections for the members of the School Board pursuant to the Lichtman plan hereby adopted by this court, and in accordance with applicable state and local law during a primary election to be hereafter scheduled and the general election to be held in November, 1988. The order of this court granting the government's motion for a stay pending appeal of the elections for the Dallas County Board of Education scheduled for June 7, 1988, and also tolling the qualification period for candidates, is hereby VACATED.

II. Intervention

Following the court's remand in *United States v. Dallas County Commission,* 739 F.2d 1529 (11th Cir. 1984), black residents of Dallas County moved for leave to intervene on behalf of themselves and a class of black citizens of Dallas County in order to participate on the question of remedy, pursuant to Rules 24(a) and 24(b), Federal Rules of Civil Procedure. The district court denied the motion on the ground that two of the named representatives of the plaintiff class were named representatives in a previous class action encompassing the same complaint, which had been dismissed with prejudice at the request of the named representatives in October 1977. Be-

cause no member of the class appeared to contest the dismissal, the district court reasoned that the named representatives and others had no standing to appear in the present suit.

[4] In denying the applicants' motion for intervention, the district court did not specify whether it was treating the motion as a motion to intervene as of right under rule 24(a) or as a motion for permissive intervention under rule 24(b). The denial of a rule 24(a) motion is a final appealable order. *Brotherhood of R.R. Trainmen v. Baltimore and Ohio R.R.*, 331 U.S. 519, 524, 67 S.Ct. 1387, 1389, 91 L.Ed. 1646 (1947); *Sellers v. United States*, 709 F.2d 1469, 1471 (11th Cir. 1983). The time for appeal therefore began to run when the district court denied the applicants' motion on February 5, 1986, and expired sixty days thereafter. *Sellers*, 709 F.2d at 1471; *see also* Fed.R.App.P. 4.[7] The applicants' notice of appeal was not filed, however, until December 18, 1987, approximately twenty months after the denial of their motion became appealable. Accordingly, the appeal must be dismissed for lack of jurisdiction.

[5,6] Because we have no jurisdiction to review the district court's denial of the applicants' rule 24(a) motion, the sole remaining question is whether the district court properly denied the motion to intervene under rule 24(b). The decision whether to allow pemissive intervention is committed to the sound discretion of the district court, and will not be disturbed absent

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[7] Rule 4, Fed.R.App.P. provides in pertinent part:

> Rule 4. Appeal as of Right — When Taken
>
> (a) Appeals in Civil Cases.
>
> (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from: *but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry.* [Emphasis added.]

a clear abuse of discretion. *Sellers,* 709 F.2d at 1471; *Cisneros v. Corpus Christi Independent School District,* 560 F.2d 190, 191 (5th Cir. 1977), *cert. denied sub nom. Barnett v. Cisneros,* 434 U.S. 1075, 98 S.Ct. 1265, 55 L.Ed.2d 781 (1978).[8] The applicants sought intervention approximately eight years after the commencement of this action and have offered no reason for their excessive delay. Moreover, the applicants have not demonstrated that the government cannot adequately represent their interest during the remedy phase of this litigation. Accordingly, we hold that the district court did not abuse its discretion in denying the motion for permissive intervention.

CONCLUSION

(1) The remedial plan drawn by the district court for election of members of the Dallas County Board of Education does not comply with section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. Accordingly, the district court's order adopting an election plan, is VACATED. The case is remanded to the district court for the sole purpose of directing the members of the Dallas County Board of Education to conduct elections for the members of the School Board pursuant to the Lichtman plan adopted by this court and in accordance with applicable state and local law during a primary election to be hereafter scheduled and the general election to be held in November, 1988. The order of this court granting the government's motion for a stay pending appeal of the elections for the Dallas County Board of Education scheduled for June 7, 1988,

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[8] The applicants for intervention have also filed a notice of appeal from the district court's order adopting its proposed election plan as to the Dallas County Board of Education. *United States v. Dallas County Commission,* 671 F.Supp. 1337 (S.D.Ala. 1987). The School Board, citing *Brotherhood of R.R. Trainmen,* argues that the applicants have no standing to challenge the district court's judgment on the merits because they were never parties to the proceedings below. We need not pass upon this question in light of our holding that the district court did not abuse its discretion in denying the applicants' motion for intervention.

and also tolling the qualification period for candidates, is hereby VACATED. The district court shall comply with the mandate of this court in an expeditious manner.

(2) The applicants' appeal from the district court's denial of their motion to intervene is AFFIRMED.

AFFIRMED in part, REVERSED and VACATED in part, and REMANDED with instructions.

HILL, Circuit Judge, concurring specially:

In our system of the administration of justice it is necessary that this court and its judges be bound by the judgments of the Supreme Court. It is also very important that there be adherence to the doctrine of *stare decisis* so that this panel is bound by the opinions of earlier panels of our court. For these reasons, although I find Judge Gibson's dissent persuasive, I feel compelled to concur in the judgment.

I have previously expressed my view that the approach we are taking to the right of each of us to vote is, in these cases, ill-advised. *See Kirksey v. Board of Sup'rs of Hinds Cty., Miss.*, 554 F.2d 139, 159 (5th Cir. 1977) (Hill, J., dissenting). *See also Edge v. Sumter County School Dist.*, 775 F.2d 1509, 1514 (11th Cir. 1985) (Hill, J., specially concurring); *Lee County Branch of NAACP v. City of Opelika,* 748 F.2d 1473, 1483 (11th Cir. 1984) (Hill, J., specially concurring). At the risk of redundancy, I write separately because I perceive it to be important that we state simply and straightforwardly just what it is that we are doing.

Simply put, we are "rigging" elections. The cases are said to be brought by or on behalf of voters, but our judicial political science is aimed at giving relief, not to voters, but to candidates. In the various political subdivisions of the states in our circuit we have gone about setting aside certain seats for black candidates to win and certain seats for white candidates to win. A

prerequisite to our grant of relief is that it be found, as a matter of fact, that in these political subdivisions white voters vote as a bloc for white candidates and black voters vote as a bloc[1] for black candidates. By gerrymandering the political area so as to produce a quota of white majority districts and a quota of black majority districts, we undertake to insure, in these regrettably bloc voting places, that there will be a certain number of white officials and a certain number of black officials.

Now, it is said that this is a method of insuring that each voter has equal access to the political process, "equal access" apparently being interpreted as equal opportunity to elect the candidate of his or her choice. However, we overshoot that goal when we leave an impotent black minority in the white majority districts, and an impotent white minority in the black majority districts. Those minorities, upon the premise from which we have been judicially legislating, have utterly no access to the political process.

We are bent upon polarizing political subdivisions by race. The arrangement we construct makes it unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens. When the Voting Rights Act was passed, in those parts of the country where black citizens had been effectively disenfranchised, a fear arose among some segregationist white people that black citizens would begin to vote and, as a consequence, elected officials who hoped to be reelected might have to begin to respond to the wishes of black citizens. Such compelled responsiveness was viewed as a threat. The work of the federal judiciary in this area has removed that "threat." Under our arrangement, white

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[1] These bloc voters are sometimes referred to as a "politically cohesive" group. *See Thornburg v. Gingles,* 478 U.S. 30, 51, 106 S.Ct. 2752, 2767, 92 L.Ed.2d 25 (1986).

citizens can elect their own candidates who do not need to give consideration to the wishes of blacks. The black voters are gerrymandered into their own districts where they can vote for their own candidates. Had this arrangement been devised by white segregationists it could not have been a more effective segregationist response to the inevitable enforcement of the Voting Rights Act.

As I stated, we resolve these cases, brought by or on behalf of voters, by creating racially "safe boroughs" for candidates. What we do serves those who would be candidates very well, but is disserves voters, who lose the opportunity to have a political responsiveness from all candidates and elected officeholders.

This impact and its resulting responsiveness has been demonstrated. The message of the Voting Rights Act did not create that responsiveness, but its firm and unyielding enforcement did. Governors are elected statewide, as are senators. Over the years of our republic, each of these officeholders has, by and large, represented his or her constituency. When each had a constituency that did not include blacks, there was little, if any, response to the needs and wishes of blacks. The enforcement of the Voting Rights Act worked a remarkable change in constituencies and it has been said that those who are elected to office or who hope to be reelected have "learned to count." That is the way representative government works. It is politically unsafe for an officeholder to ignore the legitimate needs and wishes of any people who have the opportunity to vote for the officeholder. If, however, by oppression or by gerrymandering, a certain group can be prevented from voting for a particular office, then the holder of that office will have no political reason to pay attention to the needs of that group. We go about cleverly accomplishing that result.

At the risk of hypocrisy we do our "rigging" disguised as geography. We segregate the races politically, by drawing district lines which divide the geography of the county based

upon the race of those residing there. Race determines the geography, not the other way around.

It is not good that we engage in pretense. It is even worse when this system perpetuates racial separation. We have a Fair Housing Law, 42 U.S.C. §§ 3601-3631; yet by creating these separate, but presumably equal, political units, we say to the voters of the county: "if you wish to participate in the political process, reside with your race in your district." Indeed it might constitute a violation of the court decree to construct a residential project, subdivision, apartment complex, or the like which appears to be attractive to the members of one race but which is located in the district reserved for the other race. I should rather that we not discourage people from living wherever they please regardless of race.

Finally, I record here my total disagreement with the implication of Dr. Lichtman, a witness produced by the plaintiff and whose theory was accepted by the court, that in Dallas County, Alabama, or anywhere else it requires 61.03 percent black citizens to equal 38.07 percent white.

Justice Douglas expressed prophetic concern in his dissent in *Wright v. Rockefeller,* 376 U.S. 52, 59, 84 S.Ct. 603, 606, 11 L.Ed.2d 512 (1964). In that opinion he noted that several countries in fact segregate voting and elected positions, allocating seats to racial, ethnic and religious groups, but he voiced his belief that such separation was inappropriate in our country. Justice Douglas cited Lebanon, among others, as an example of a country which had adopted proportionate representation by religion. *Id.* 84 S.Ct. at 610 & n. 11. That unhappy land does not bear witness to the aspiration that these sorts of political allocations will produce harmony among a people.

I envision a paper prepared, some years from now, by a social scientist. It will report on political processes in the three states of our circuit. Assuming that we have dealt with arrangements for electing city council members, school board members and

county commissioners along the lines of our precedent, the paper will accurately report that blacks are effectively excluded from voting in the majority of elections to such offices. I anticipate the paper's title being something like: "The Political Resegregation of the South." I write today so that the author may note, if he or she will, that not all of us agreed.

With regret, I concur.

GIBSON, Circuit Judge, dissenting:

I have considerable doubts about whether the district court's remedial plan violates the Voting Rights Act. The district court's plan creates two "safe" white districts, two "safe" black districts, and a so-called swing district which is 54.5 percent black and has a 49.8 percent black voting age population. Although a more evenly divided county may be difficult to find, I would be willing to concede that in view of prior Eleventh Circuit decisions, the at-large nature of the swing district may impede the ability of black voters to compete with white voters in electing the candidate of their choice. *See, e.g., Dillard v. Crenshaw County,* 831 F.2d 246, 250 (11th Cir. 1987).

Yet, assuming the district court erred, I am unable to concur in the majority opinion because of its reliance on the opinion of Dr. Lichtman. It was the district court's prerogative to pass on the credibility of the witnesses and here apparently the district court failed to view credibly Dr. Lichtman's testimony. I would give deference to the district court's decision in this regard rather than as an appellate court rely on the record in reviewing this credibility decision. Further, I can not endorse a plan which, in the name of equal opportunity, creates a swing district which is 61.3 percent black and 38.7 white. I fail to see the fairness in gerrymandering until blacks have a 22.6 percent superiority, when the majority at pages 1439-40 rejects the district court's plan on the grounds that it creates a district with a .4 percent superiority in white voting age population. I do not understand how a .4 percent white voting age superiority

violates the Act while a 22.6 percent overall black superiority is mandated by the Act.

As the majority notes in footnote six, "we must ensure that this or any other plan guarantees equal *access* to the political process, not equal participation among races." (Emphasis in original). The majority attempts to accomplish this by gerrymandering the district lines to give greater weight to the black vote. In contemplation of a low black voter turnout in its proposed swing district, the majority has "stacked the deck" in favor of those blacks who choose to participate. The majority's plan ensures that low black participation, whatever the cause, will not reduce a black candidates ability to *win*. As such, it appears violative of the Equal Protection Clause and the constitutional principle of one person one vote announced in *Reynolds v. Sims,* 377 U.S. 533, 563, 84 S.Ct. 1362, 1382, 12 L.Ed.2d 506 (1964) wherein the Court held that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.' " (Citations omitted). Although the *Reynolds* case dealt with disparity in population of voting districts the same principle would appear to be applicable to giving added weight to a person's vote because of racial considerations.

Furthermore, the Voting Rights Act Amendments of 1982 on its face appears aimed in subsection (a) at removing barriers to participants in the voting process by members of any race and not to give greater weight to a peron's vote because of race; while subsection (b) of that Act sets forth a Congressional mandate for a violation when "the political processes . . . are not equally open to participation by members of a class of citizens protected by subsection (a). . . ." Here the political voting process does appear to be open to all citizens regardless of race. The complaint of the government appears to be based on not the lack of openness and accessibility in the voting process but

on the lack of interest or inclination to vote by certain qualified voters.

Finally, I agree with the concerns expressed by Judge Hill in his concurring opinion regarding the creation of voting district along racial lines. "Safe" districts promote racially polarized voting and ensure that the minority voters, whether white or black, are effectively unrepresented. Certainly this is not the aim of the Voting Rights Act.

For these reasons I respectfully dissent from part I of the majority opinion, and in deference to the majority view would remand with instructions to create five separate single-member districts composed in a compact manner and approximately equal in population. I concur in part II.

APPENDIX E

In the United States Court of Appeals
For the Eleventh Circuit

No. 87-7459

Filed: Sept. 9, 1988

United States of America,
Plaintiff-Appellant,

Samson Crum, Sr., Edwin Moss, Frederick D. Reese, Clarence Williams, on behalf of themselves and all others similarly situated,
Movants-Appellants,

v.

Dallas County Commission, Dallas County, Alabama,; Jones, John W., Jr., Chairman; Deans E. Barber, Jr., William H. Kendrick, C. Stanley Baldwin, James S. Wilkinson, Members, Earl Goodwin, Chairman of the Dallas County Democratic Executive Committee and John J. Grimes, Chairman of the
Dallas County Republican Executive Committee,
Defendants-Appellees,

Dallas County Board of Education, et al.,
Defendants.

Appeal from the United States District Court for the Southern District of Alabama on Petition for Rehearing and Suggestion of Rehearing in Banc (Opinion July 13, 1988, 11th Circuit, 1988 F.2d.

Before Hill and Hatchett, Circuit Judges, and Gibson*, Senior Circuit Judge.

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*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Per Curiam:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED for the Court:

/s/ Joseph W. Hatchett
United States Circuit Judge

APPENDIX F

In The United States Court of Appeals
For the Eleventh Circuit

No. 87-7766

Filed: Sept. 9, 1988

United States of America,

Plaintiff-Appellant,

Samson Crum, Sr., Edwin Moss, Frederick D. Reese, Clarence Williams, on behalf of themselves and all others similarly situated,

Movants-Appellants,

v.

Dallas County Commission, Dallas County, Alabama, et al.,

Defendants,

Dallas County Board of Education, John J. Grimes, Jr., William R. Martin, Harold Joe Bradford, Dr. Catherine Bozeman, Elton R. Ralston, Members, Earl Goodwin, Chairman of the Dallas County Democratic Executive Committee, and John J. Grimes, Chairman of the Dallas County Republican Executive Committee,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama on Petition(s) for Rehearing and Suggestion(s) of Rehearing In Banc (Opinion July 13, 1988, 11th Circuit, 1988, F.2d).

Before Hill and Hatchett, Circuit Judges, and Gibson*, Senior Circuit Judge.

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*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Per Curiam:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED for the Court:

/s/ Joseph W. Hatchett
United States Circuit Judge

APPENDIX G

The Provisions of Amendment XIV to the Constitution of the United States reads as follows:

SECTION 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2: Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3: No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the

Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

SECTION 4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5: The Congress shall have power to enforce, by appropriate legislation the provisions of this article.

APPENDIX H

The Provisions of Amendment XV to the Constition of the United States reads as follows:

SECTION 1: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

SECTION 2: The congress shall have the power to enforce this article by appropriate legislation.

APPENDIX I

Statutory Provisions Involved

Section 2 of the Voting Rights Act of 1965, as amended in 1982 by Pub.L.No. 97-205, 96 Stat. 131:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4 (f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: **Provided** that nothing in this section established a right to have members of a protected class elected in numbers equal to their proportion in the population.

APPENDIX J

RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 78-0578-BH

United States of America,
Plaintiff,

vs.

Dallas County Commission, et al.,
Defendants.

ORDER

The Court, upon a chance meeting with counsel for the defendant Dallas County School Board in Mobile the first part of September, was informed that the Assistant Attorney General interposed an objection to the School Board's proposed election plan and denied preclearance by letter dated June 1, 1987. At the Court's request, counsel provided the Court with a copy of such letter.

In addition to the finding that "no apparent consideration or accommodation [was] given to the comments made by blacks in attendance [at several hearings held by the School Board]", the Assistant Attorney General objected to the apparent over concentration of blacks into District 4 of the School Board's plan and fragmentation of the remaining black population in Selma, Alabama, between Districts 2 and 5. The Assistant Attorney General finally found that the efforts obviously taken to protect incumbent board members suggested that the School Board's actions "were motivated, at least in significant part, by racial considerations."

Consequently, this Court must now undertake the task of devising it's own districting plan for the election of the Dallas

County School Board, which this Court feels should be coordinated with the ordered election of the County Commission scheduled for November 1987. The Court is at once conscious of the time constraints imposed upon it by the Government's failure to advise the Court of the Attorney General's decision regarding the School Board's plan and the consequent delay in receiving the same. The Court can only hypothesize about the Government's motives, but will not allow such concerns to interfere with the task at hand.

In an effort to expedite the process so as to conform to the Court's prior order as to the County Commission election, the Court has first examined the districting plan adopted and implemented with regard to the County Commission, together with those segments of the record pertinent to that plan. In addition, the Court has considered the arguments then presented by counsel relative to this plan, including the Government's arguments in opposition to the same.[1] The Court rejected the Government's principal objections to the County Commission plan on essentially two grounds: (1) that the Court was in no position, based on the evidence of record, to declare that no rational basis exists for maintaining the Commission as a five-member governing body which includes the probate judge who is elected at-large; and (2) that the at-large seat in fact constituted under the Court's plan a swing district inasmuch as Dallas County is comprised of a general population which is 54.5% black and a voting age population which is 49.8% black. *See, United States v. Dallas County Commission,* 661 F. Supp. 955 (S.D. Ala. 1987). In addition to the at-large and, therefore, county-wide swing district, the Court's plan for the County Commission provides: two districts with black voter majorities of 75.8% and 67.2%; one district with a white voter majority of 68.8% and one district with a slight white voter majority of

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[1] Oral arguments relative to the Court's plan for the County Commission came on for hearing on April 22, 1987.

55.2%. The maximum population deviation under this plan is only 2.97% 661 F. Supp. at 958.

The Court is aware that the same unique circumstances which rendered the above districting plan a fair election plan with respect to the Dallas County Commission do not exist with respect to the Dallas County Board of Education. This is so because neither the Probate Judge nor any other official who is necessarily elected county-wide has been legislatively designated to serve as a voting member of the School Board. The Court could, therefore, proceed to devise a single-member districting plan for the School Board comprised most likely of five districts.[2]

The Court, however, is also aware of the Government's concern, raised presumably on behalf of all the citizens of Dallas County, that two distinct and variant districting plans would cause unjustified voter confusion and unnecessary difficulties in the administration and conduct of elections. It is evident that neither the potential for voter confusion and administrative difficulties nor the time constraints now imposed upon the Court would, in and of themselves, render the Court's County Commission plan appropriate for implementation as to the School Board. However, taken in combination with the overall features of the Court's County Commission plan (i.e., the fact that the county-wide district in the plan statistically constitutes a swing district), the Court concludes that the County Commission plan is as well a fair election plan for the Dallas County School Board as the Commission. *See, e.g.*, 661 F. Supp. at 958-59 (comparison of the Marengo County and the Dallas

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[2] The School Board is presently comprised of five members. In order to avoid increasing the burden on the citizens of Dallas County, both black and white, relative to the compensation of its elected officials, the Court would feel constrained to maintain the composition of the Board at five members absent evidence that such was irrational and inappropriate.

County Commission plans). The Court, therefore, proposes to implement the same as to the School Board with certain adjustments to accommodate for the exclusion, in this instance, of the Probate Judge. Specifically, the member elected to the at-large seat on the School Board shall not automatically be designated as the chairman of the Board. Rather, following the first election, the members of the newly constituted Dallas County School Board shall elect among themselves a chairman. The Court shall not intrude further into the legislative functions of the School Board and shall leave to the devises of this entity the responsibility to determine what, if any, rotation in the chair shall occur.

The parties are hereby instructed to review again the districting plan implemented as to the Dallas County Commission, copies of which have already been provided to counsel, as adjusted above. In addition, it is ORDERED that an evidentiary hearing be conducted on Friday, October 2, 1987 commencing at 9:00 A.M. in Room 204, Federal Building, Alabama and Lauderdale Streets in Selma, Alabama, for the purpose of addressing the parties' objections, if any, to the Court's proposal. The parties are FURTHER ORDERED to file at the commencement of the hearing their respective written critiques which shall delineate with specificity any objections to the proposal.

DONE this 18th day of September, 1987.

/s/ W.B. Hand
Chief Judge

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7766

(October 6, 1988)

United States of America,
Plaintiff-Appellant,

Samson Crum, Sr., Edwin Moss, Frederick D. Reese, Clarence Williams, on behalf of themselves and all others similarly situated,
Movants-Appellants,

versus

Dallas County Commission, Dallas County, Alabama, et al.,
Defendants,

Dallas County Board of Education, John J. Grimes, Jr., William R. Martin, Harold Joe Bradford, Dr. Catherine Bozeman, Elton R. Ralston, Members, Earl Goodwin, Chairman of the Dallas County Democratic Executive Committee, and John J. Grimes, Chairman of the Dallas County Republican Executive Committee,
Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Alabama

No. 87-7459

Samson Crum, Sr., Edwin Moss, Frederick D. Reese, Clarence Williams, on behalf of themselves and all others similarly situated,

Movants-Appellants,

versus

Dallas County Commission, Dallas County, Ala.; Jones, John W., Jr., Chairman; Deans E. Barber, Jr., William H. Kendrick, C. Stanley Baldwin, James S. Wilkinson, Members, Earl Goodwin, Chairman of the Dallas County Democratic Executive Committee and John J. Grimes, Chairman of the Dallas County Republican Executive Committee,

Defendants-Appellees,

Dallas County Board of Education, et al.,

Defendants.

Appeal from the United States District Court
For the Southern District of Alabama

Before HILL and HATCHETT, Circuit Judges, and GIBSON,* Senior Circuit Judge.

BY THE COURT:

The district court's Motion for Clarification of the Mandate is denied, except as follows:

* Honorable Floyd R. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

Aware that unforeseen events and time constraints render it virtually impossible for the district court to schedule elections in such a manner as to have a general election in November 1988, it is ordered;

THE DISTRICT COURT is directed to schedule primary, runoff, and general elections expeditiously and in such a manner as to conduct the general election not later than December 31, 1988.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 78-0578-H

United States of America,
Plaintiff,

vs.

Dallas County Commission, et al.,
Defendants.

ORDER

(Jan. 15, 1986)

This cause is before the Court on motion of the Dallas County Board of Education, its Superintendent and members [School Board] for severance from the remand proceeding pending against the Dallas County Commission, its members and the Judge of Probate. Upon consideration of the motion, together with the United States' response in opposition to the severance and the record as a whole, the Court concludes and it is, therefore, ORDERED that the School Board's motion for severance is due to be and is hereby GRANTED.

The Court, for the present, will take the School Board's motion for judgment on the pleadings under submission on the record. Should any remand proceedings or hearings be deemed necessary as to the School Board, the Court will so order at that time.

The Court is prepared, however, to proceed with this litigation as to the County Commission. Accordingly, it is ORDERED that a hearing will commence at 9:30 A.M., February 24, 1986 in Room 204, Federal Building, Alabama and

Lauderdale Streets in Selma, Alabama at which time the United States and the Dallas County Commission may present evidence relative to the 1982 and 1984 elections which bears directly on the issues remanded to this Court by the Eleventh Circuit Court of Appeals.

DONE this 15th day of January, 1986.

/s/ W. B. Hand
Chief Judge

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7459

United States of America,
Plaintiff-Appellant,

Samson Crum, Sr., Edwin Moss, Frederick D. Reese, Clarence Williams, on behalf of themselves and all others similarly situated.
Movants-Appellants,

versus

Dallas County Commission, Dallas County, Ala.; Jones, John W., Jr., Chairman; Deans E. Barber, Jr., William H. Kendrick, C. Stanley Baldwin, James S. Wilkinson, Members, Earl Goodwin, Chairman of the Dallas County Democratic Executive Committee and John J. Grimes, Chairman of the Dallas County Republican Executive Committee,
Defendants-Appellees,

Dallas County Board of Education, et al.,
Defendants.

MOTION FOR CLARIFICATION OF MANDATE

On September 19, 1988, the Eleventh Circuit Court of Appeals issued a mandate in each of the above-referenced cases. The Court of Appeals therein ordered, among other things, that

the cases be remanded to the District Court for action in accordance with the opinion of the Court of Appeals. The opinion referred to in each of the mandates issued on September 19, 1988 was entered by the Court of Appeals on July 13, 1988. In substance, the Court of Appeals ordered this Court to direct the members of both the Dallas County Board of Education and the Dallas County Commission to conduct elections for the members of their respective governmental entities pursuant to the "Lichtman plan" which was adopted by the Court of Appeals. In its July 13, 1988 opinions, the Court of Appeals further ordered that, although these elections are to be conducted in accordance with applicable state and local law, the elections are to be scheduled in a manner assuring culmination with the general election to be held in November, 1988. This Court was directed in the July 13, 1988 opinons to comply with the mandates of the Court of Appeals "in an expeditious manner" and yet such mandates did not issue until September 19, 1988.

One of the principal problems confronting this Court relative to the necessity of complying with the appellate mandates in an expeditious manner is that this Court has not, in the proper context, examined or studied the "Lichtman plan". This Court is also confronted with certain time constraints which would appear to foreclose any adherence to applicable state and local election laws. Consequently, the Court finds it necessary to seek clarification and guidance from the Court of Appeals relative to its opinions of July 13, 1988 and its mandates on September 19, 1988.

In order to clarify this Court's perception of the first problem set forth above, a brief summary of the context within which this Court examined the "Lichtman plan" is perhaps indicated. On October 2, 1987, this Court conducted a hearing for the sole purpose of addressing an election plan proposed by this Court for implementation as to the Dallas County Board of Education. At this point in time, judgment had already been entered in that portion of the case which involved the Dallas County

Commission. In fact, the County Commission's case was then pending on appeal before the Eleventh Circuit. Consequently, the only parties participating in the October 2, 1987 hearing on the School Board election plan were the Dallas County Board of Education and the Government. At this hearing, the Government introduced into evidence a five-single member district plan developed by Joe L. Reed, Chairman of the Alabama Democratic Conference (the "Reed Plan"). Counsel for the Government, Jerry Hebert, made abundantly clear that this evidentiary proffer of the "Reed plan" was made only under the following provision:

> So what I would like the record to clearly reflect is this is a model, if you will, or a sample or an example of a five single member district plan and we are not advocating to the court to adopt this plan for the Dallas County . . . School Board, but we did think it would be helpful to have the plan in the record and contrast it as well as the five single member district proposal developed by the Dallas County [School Board].

(Transcript of October 2, 1988 hearing at p. 20). The "Reed plan" was later rejected by the Government's expert witness, Dr. Allan J. Lichtman, on grounds that it did not contain a "swing district", a fact admitted by Joe Reed during his testimony. Other than the limited proffer of the "Reed plan", the Government did not introduce into evidence at the October 2, 1987 hearing any documentary evidence concerning another example of a districting plan given by Dr. Lichtman during his testimony. Mr. Hebert specifically stated to the Court that it ws proffering Dr. Lichtman's testimony only for purposes of criticizing, by contrast, the Court's proposed plan and that: "I want to put the caveat on the numbers that [Dr. Lichtman] was advancing, that these are not a proposed plan that we think the Court ought to propose necessarily." (Id at pp. 59-60). Upon this Court's request, Mr. Hebert agreed to submit the "sample plan that Dr. Lichtman has worked with" to the Court if, and

only if, Mr. Bradford Reynolds of the Justice Department approved the submission. (Id. at p. 61). Mr. Hebert explained to this Court that:

> [W]e do not want to be in a position of proposing a plan for school authorities on the County Commission because the role of coming up with plans is not something the Justice Department should be perceived as pushing down someone's throat.

Id. at p. 61-62). After this hearing, the Government did in fact file certain documents which set forth Dr. Lichtman's sample plan.

The Court did examine the plan submitted by the Government after the October 2, 1988 hearing, but only for the purpose of comparing that plan with the Court's proposed plan. This Court made no study to determine if the figures advanced by the Government were proper under one man/one vote principles and Section 2 of the Voting Right Act or if the plan sufficiently delineated any boundary lines. Certainly no evidence was taken on these points. This Court, therefore, is unable to effectuate the Court of Appeals' mandate and order until it receives the record from the Court of Appeals which contains the documents or the appellate court plan. At this juncture the Court can only speculate that it would be able to draft the required order establishing voting districts under a "Lichtman plan". In addition, this Court has been advised that, in response to a motion filed in this Court by the defendants on September 22, 1988 for a particular delineation of boundaries contained in the "Lichtman plan", the Government is preparing corrected and more detailed maps for submission in order to cure some of the defects noted by the defendants. This Court is concerned that such maps do not constitute part of the record in either the district or the appellate court and questions whether it has any authority to accept or rely on the production of such an after-the-fact fact.

This Court is also concerned that no testimony as to the figures constituting the number of electors or population in each district of the "Lichtman plan" has ever been had by either the School Board or the County Commission or has ever been presented to the Court. This Court requires direction from the Court of Appeals that it must accept untested figures as being correct statements under the one man/one vote rule. This Court is unwilling, on its own, to impose a stricture on the electorate which could be wrong without further proof, but will do so if directed by the Court of Appeals.

A second area of consternation to the Court is that, pursuant to an order issued by this Court in an effort to comply with the appellate mandate, the Government has sumitted a proposed schedule for the conduct of elections as to the School Board and County Commission. This Court now knows that it is physically impossible to meet the strictures of the times specified in the Government's response. Even if it were physically possible to schedule elections in a manner permitting culmination with the November, 1988 general election, such would not only violate the Alabama election laws, but would deny, in this Court's opinion, a fair election. This is so inasmuch as no proper districting lines can yet be established; no voting lists for those districts can be compiled; candidates will not have an opportunity to know with specificity the district lines which would govern their eligibility to qualify; and candidates will not have time to conduct any meaningful campaign in support of their candidacy. In addition, there is insufficient time between now and the general election in November to conduct primary and run-off elections and to have the candidates' names added to the voting machines or printed on printed ballots. Further, ballots for absentee voting in either the primaries or the general election could not be prepared and made available in accordance with state election laws. According to the election officials of Dallas County, the absentee ballots for the upcoming elections have already been printed.

This Court, therefore, requests clarification and guidance from the Eleventh Circuit Court of Appeals relative to the opinions entered on July 13, 1988 and the mandates issued on September 19, 1988 in the above-referenced cases, and to the concerns this Court has expressed with regard to the timely implementation of the "Lichtman plan" which was adopted by the Court of Appeals.

Respectfully submitted,

/s/ W. B. Hand, Chief Judge
United States District Court
for the Southern District of
Alabama

FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-992

In the Supreme Court of the United States

OCTOBER TERM, 1988

DALLAS COUNTY COMMISSION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JAMES P. TURNER
Acting Assistant Attorney General
JESSICA DUNSAY SILVER
MARIE K. MCELDERRY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

19pp

QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard of review in reversing the district court's judgment approving an election plan to remedy petitioners' violations of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

2. Whether the court of appeals properly required the district court to order elections under an election plan offered by the United States in a remedial hearing concerning the School Board, instead of remanding the case for further proceedings in the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-992

DALLAS COUNTY COMMISSION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals concerning the Dallas County Commission (Pet. App. A15-A19) is reported at 850 F.2d 1430. The opinion of the court of appeals concerning the Dallas County Board of Education (Pet. App. A20-A47) is reported at 850 F.2d 1433. The district court's order adopting an election plan for the Commission (Pet. App. A1-A8) is reported at 661 F. Supp. 955. The district court's order adopting an election plan for the Board (Pet. App. A9-A14) is reported at 671 F. Supp. 1337.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1988. Petitions for rehearing were denied on September 9, 1988. Pet. App. A48-A51. The petition for a writ of certiorari was filed on December 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed this vote dilution case in October 1978. The complaint alleged that the at-large method of electing members of the Dallas County Commission and the Dallas County Board of Education impermissibly diluted black voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments. Pet. App. A23.

1. Dallas County is located in south-central Alabama. Pet. App. A22. Selma is the county seat. According to the 1980 census, the county had a population of 53,981, approximately 55% of whom were black. *Ibid.* Blacks comprised 49% of the voting age population, however, and only 44.8% of the registered voters. *Ibid.*[1] Since 1901, the Dallas County Commission has consisted of four commissioners elected at-large from residency districts and the county probate judge, also elected at-large, who served as ex officio chairman and who had the power to vote in case of ties. The Dallas County Board of Education, at the time

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[1] The comparable figures for the 1970 census showed blacks to be 52.3% of the total population, 47% of the voting age population, and 43.3% of the registered voters. 548 F. Supp. at 886-887. The most recent voter registration statistics in the record (1984) show that 37,232 persons were registered, of whom 18,043 (48.46%) are black and 19,189 (51.54%) are white, PX. B-30.

of trial, had five members elected at-large from numbered posts for six-year staggered terms. Ala. Code, §§ 16-18-1, 16-8-2 (1975).

The history of voting discrimination in Alabama generally, and specifically in Dallas County, is well-documented in the reported decisions. See *United States* v. *Dallas County Comm'n.* 548 F. Supp. 875, 887-888 (S.D. Ala. 1982).[2] Despite numerous black candidacies since 1965, no black has been elected to the Commission or the School Board when opposed by a white candidate in an at-large election. Pet. App. A22.[3] Elections in Dallas County have been marked by a high degree of racial bloc voting.

2. In September 1982, the district court issued decisions finding in favor of the Board, 548 F. Supp. at 794, and the Commission, 548 F. Supp. at 875. The court made numerous findings weighing in favor of dilution.[4] It nonetheless concluded that the United States had failed to prove either that the at-large system of election was

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[2] See also, *e.g.*, *United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *United States* v. *Atkins,* 323 F.2d 733 (5th Cir. 1963); *United States* v. *Clark,* 249 F. Supp. 720 (S.D. Ala. 1965); *United States* v. *Alabama,* 252 F. Supp. 95 (M.D. Ala. 1966); *Williams* v. *Wallace,* 240 F. Supp 100 (M.D. Ala. 1965); *Davis* v. *Schnell,* 81 F. Supp. 872 (S.D. Ala.), aff'd, 336 U.S. 933 (1949).

[3] In 1982, a black woman, Catherine Bozeman, was appointed to the Board of Education to fill an unexpired term. She ran unopposed in 1984.

[4] The district court found that (1) black candidates had been uniformly defeated, 548 F. Supp. at 902, 916; (2) voting in elections between black and white candidates had been marked by racial polarization, *id.* at 906, 916; (3) there had been a pervasive history of racial discrimination in voting, *id.* at 887-888, 916; (4) the socio-economic status of blacks was depressed, *id.* at 908, 916; (5) there is a majority vote requirement in party primaries, which are crucial to election in Dallas County, and (6) candidates must run for numbered posts, *id.* at 908.

created or maintained for a discriminatory purpose or that the system had a discriminatory result within the meaning of Section 2 of the Voting Rights Act, as amended in 1982.[5]

The court of appeals affirmed in part, vacated in part, reversed in part, and remanded for further proceedings. 739 F.2d 1529, 1541. The court of appeals concluded that the district court had committed clear error in finding that racial polarization was not a significant factor in the consistent defeat of black candidates. *Id.* at 1536. It also held that the district court erred in concluding that the requirement that candidates run for numbered posts did not weigh in favor of a finding of vote dilution. *Ibid.* The court of appeals concluded that the district court's errors on these two significant factors required reversal. *Id.* at 1537. It also ordered the district court to reconsider on remand the low socio-economic status of blacks and other possible lingering effects of past discrimination in determining whether the at-large system resulted in a dilution of the black vote. *Id.* at 1537, 1541.

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[5] The case was originally tried in November 1979 under the standard articulated by the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). See *United States* v. *Dallas County Comm'n*, 739 F.2d 1529, 1532 (11th Cir. 1984)). Following the decision in *Mobile* v. *Bolden*, 446 U.S. 55 (1980), in which a majority of this Court disapproved exclusive reliance on the *Zimmer* factors as proof of unlawful dilution, the United States sought to present evidence that the at-large scheme of election was adopted with discriminatory intent. By the time the district court issued its decision, however, Congress had amended Section 2 to make clear that proof of discriminatory intent is not required to establish a violation of Section 2, S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982), and the district court applied that standard in reaching its decisions.

On remand, the district court, over the objection of the United States, granted the School Board's motion for "severance" from the Commission portion of the case. Pet. App. A64-A65. The court then granted the Board's motion for judgment on the pleadings, concluding that the court of appeals' decision had "left undisturbed" the district court's prior judgment in favor of the Board. *United States* v. *Dallas County Comm'n,* C.A. No. 78-578-H (S.D. Ala. Feb. 11, 1987), slip op. 2. The court of appeals summarily reversed that judgment with express direction that the district court grant the United States' motion for a preliminary injunction against the upcoming School Board elections. 791 F.2d 831, 833.

3. During the pendency of that appeal, the district court held a hearing on the remanded issues concerning the Commission. In March 1986, it enjoined the upcoming primaries for Commission elections and ordered the Commission to prepare a fair election plan. In June 1986, it issued an opinion finding that the at-large system of electing county commissioners violated Section 2. 636 F. Supp. 704.[6] After the Attorney General interposed an objection,

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[6] The court found that the evidence presented on remand concerning racial bloc voting in elections since 1982 showed no substantial change in voting patterns in Dallas County and thus would not "change the opinion expressed by" the court of appeals, *i.e.,* that the district court committed clear error in finding that racial polarization in voting was not a significant factor in the failure of blacks to win elections. 636 F. Supp. at 708, 710. It "incorporate[d]" the court of appeals' mandate that the combination of a majority requirement in the primary, the significance of the Democratic primary, and the use of numbered posts "operates to cancel voting strength of minorities in Dallas county." *Id.* at 709. Finally, it found that the factor of "past discrimination and its lingering effect" became "superfluous" in light of the great weight attributed to polarized voting and the structure of the election system by the court of appeals. *Ibid.*

pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to the plan prepared by the Commission, Pet. App. A26 n.3, the district court drew its own plan. The district court's plan consisted of two districts in which white voters held an electoral majority and two districts in which black voters were in the majority and also retained the probate judge as ex officio chairman of the Commission elected at-large from the county. Without holding an evidentiary hearing, and over the objection of the United States, the court ordered its plan into effect for the November 1988 elections. Pet. App. A1-A8.

Following remand from the court of appeals in the Board portion of the case, the district court entered an order adopting as to the Board the same findings and conclusions as it had made for the Commission and ordered the Board to draw a fair election plan, *United States* v. *Dallas County Comm'n,* C.A. No. 78-578-H (S.D. Ala. Feb. 11, 1987). The Board drew, and submitted for Section 5 preclearance, a plan containing five single-member districts. After the Attorney General objected to the configuration of the districts, Pet. App. A27-A28, the district court entered an order proposing to adopt for the Board substantially the same plan that it had ordered for the Commission. *Id.* at A57-A60.[7] After an evidentiary hearing and again over the objections of the United States, the court ordered that plan into effect for the November 1988 Board elections. *Id.* at A9-A14.

4. Appeals by the United States from both remedial orders were consolidated for purposes of oral argument, and on July 13, 1988, the court of appeals reversed,

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[7] The only difference between the two plans was that the member elected at-large on the Board would not act as its chairman. Pet. App. A13-A14.

holding that the election plans adopted by the district court were insufficient to remedy the Section 2 violation. Pet. App. A25-A47. Because of the length of time that had passed since the last elections for Commission and Board of Education were held in Dallas County, the court of appeals determined that the delay that would be occasioned by a remand for a further hearing was unwarranted. *Id.* at A37-A38. The court of appeals found that the district court had committed clear error in two respects in rejecting a remedial plan drawn by the United States' expert, Dr. Allan Lichtman, as an alternative to the court-drawn plan. *Id.* at A36-A37. It therefore ordered the district court to schedule elections for both bodies under the Lichtman plan. *Id.* at A18, A38. The court of appeals subsequently denied petitions for rehearing filed by both petitioners. *Id.* at A48-A51.[8]

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[8] The mandate issued on September 19, 1988. It called for elections to be held under the Lichtman plan pursuant to a schedule (to be established by the district court) that would allow the general election to be held in November. Pet. App. A18, A40-A41. Shortly thereafter, the United States filed in the district court a proposed election schedule that would have allowed elections to be held in accordance with that mandate. Rather than issue an election schedule, however, on September 30, 1988, the district court itself filed a motion for clarification of the mandate. *Id.* at A66-A71. In that motion, the court stated that it had studied the Lichtman plan only for the purpose of comparing that plan to the court's own plan but had not determined its legality under Section 2 or the Fourteenth Amendment. Pet. App. A69. The court also stated that it was unsure of the district boundaries drawn by the plan. Pet. App. A69-A70. Finally, the court contended that insufficient time remained for scheduling primary and run-off elections in order to allow for a general election in November 1988. *Id.* at A70. The court therefore requested "clarification and guidance" from the court of appeals. *Id.* at A71.

The court of appeals denied the district court's motion on October 6. Pet. App. A61-A63. It provided, however, that because it was then

ARGUMENT

Petitioners press two main contentions. They assert that the court of appeals improperly applied the clearly erroneous standard of Fed. R. Civ. P. 52(a) in concluding that the election plan adopted by the district court was inadequate to cure petitioners' violation of Section 2. In addition, they contend that the court of appeals erred in ordering the district court to adopt an alternative plan, rather than remanding the case for further hearings. Neither contention is correct. The court of appeals properly applied established precedent from this Court in reaching its decision, and petitioners point to no conflict among the circuits concerning the issues on which they seek review. Moreover, both issues are necessarily tied to the circumstances of this litigation, and neither presents an important federal question requiring resolution by this Court. Accordingly, review by this Court is not warranted.

1. The issue before the court of appeals was whether the election plan drawn and adopted by the district court was an adequate remedy for petitioners' Section 2 violations. The district court had already found that the at-large election schemes employed by petitioners resulted in an unlawful dilution of the voting strength of minority

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"virtually impossible" to schedule elections so as to hold the general election in November, the general election should be held not later than December 31, 1988. *Id.* at A63. That election was held on December 27, 1988. New commissioners and board members were recently sworn in at Selma.

On January 31, 1989, the five new commissioners filed a pro se motion to dismiss the petition in this case. The school board did not join in that motion. If the motion is granted, the Commission will no longer be a party to this case. In that event, however, the case will be even less deserving of review.

voters under Section 2,[9] and the district court made no additional relevant factual determinations in adopting the remedial plans.[10] Given the factual determinations that the district court had already made in that regard, the United States contended on appeal that the court had abused its discretion in retaining an at-large seat on the Commission and the School Board. Based upon the same findings made by the district court in connection with the liability stage of the case, the court of appeals concluded that retention of one at-large seat in the remedial plan would continue the past denial of the rights of black voters. Thus, the court of appeals was not required to find any factual determination made by the district court to be

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[9] The facts supporting the violation are as follows: (1) elections in Dallas County continue to be marked by an extreme degree of racial bloc voting; (2) despite numerous black candidacies since 1965, no black candidate has been elected in an at-large contest against a white candidate during that period, or, indeed, since Reconstruction; (3) blacks, who in 1980 constituted 55% of the total county population, 49.8% of the voting age population, and 44.8% of the registered voters, "share a vastly lower socio-economic status than do whites in Dallas County" and have been the victims of "pervasive racial discrimination that has left [them] economically, socially, culturally, and politically disadvantaged," Pet. App. A4, A33-A34; and (4) the use of numbered posts and a majority vote requirement in the crucial primary elections has contributed to the dilution of minority voting strength. *Ibid.* Given the racial composition of the county's electorate and severe racial bloc voting, the at-large scheme of election denied black voters an equal opportunity to elect candidates of their choice.

[10] Indeed, the district court did not even hold an evidentiary hearing before adopting the remedial plan for the Commission. While the United States noted on appeal that the failure to hold such a hearing was contrary to the law of the circuit, *Edge* v. *Sumter County School Dist.*, 775 F.2d 1509 (11th Cir. 1985), we argued that the record as developed on remand, which led the district court to find a violation, was itself sufficient to demonstrate that the remedial plan adopted by that court was inadequate. No. 87-7459 Gov't C.A. Br. 19.

clearly erroneous in order to conclude that the plans it had adopted did not provide an adequate remedy for the Section 2 violations.

Petitioners point to no specific factual finding made by the district court that was disregarded by the court of appeals. Although petitioners categorize (Pet. 13) as an "ultimate factual finding" the district court's statement that its remedial plan was "fair" (Pet. 13), that "finding of fact * * * is inseparable from the principles through which it was deduced," *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 n.17 (1984). The fairness of an election plan in a vote dilution case is determined by whether it meets the statutory standard established by Section 2.

Here, the district court had found that its election plans for the Commission and the Board were "fair," because it found that the at-large seat in its plan was the equivalent of a fifth "swing" district. By definition, however, a swing district should be one in which black voters have a fair chance of electing candidates of their choice.[11] But the

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[11] There is considerable discussion by the court of appeals of the district court's finding that the at-large seat in the court-approved plan is the equivalent of a fifth "swing" district, because it reflects the county-wide population. Pet. App. A31-A34. The court of appeals did "disagree" with that finding, but the disagreement is not a factual one, *id.* at A33. Rather, the court of appeals concluded that the district court's analysis failed to take into account the lower voting age population of blacks and the fact that past racial discrimination and the vastly lower socio-economic status of blacks result in an even lower population of black registered voters and low black turnout at the polls. *Id.* at A33-A34. In addition, the United States argued below that blacks would be especially disadvantaged if the plan included an at-large seat rather than a single-member district with a comparable racial composition because blacks disproportionately lacked the financial resources to run a county-wide campaign and, because of racial attitudes that are the legacy of past racial discrimination, were

district court had already found that black voters had no such chance in an at-large election in Dallas County. Accordingly, the court of appeals properly concluded that, for the same reasons that the at-large election system unlawfully diluted black voting strength, the election plans adopted by the district court, which retained an at-large feature, did not as a whole provide the black voters of Dallas County with an equal opportunity to participate in the electoral process and elect candidates of their choice. Using the facts found by the district court, the court of appeals concluded, as a matter of law, that the district court's plans "perpetuate[] rather than ameliorate[] the inequities which have resulted in an abridgement of Dallas County's black citizens' access to the political process." Pet. App. A34.[12]

2. Petitioners also contend (Pet. 16-23) that the court of appeals erred in requiring the district court to order elections under the Lichtman plan, one of two plans offered in evidence during the Board remedial hearing, rather than remanding to the district court for further hearings. Although we did not ask the court of appeals itself to order a particular plan to be implemented, we submit that the court of appeals' action was within its authority in the peculiar circumstances of this litigation.

As the court of appeals noted, although ten years had passed since this lawsuit was commenced, black citizens of

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not able to campaign effectively in predominantly white areas of the county.

[12] Contrary to the district court's characterization, Pet. App. A11 n.3, the United States did not take the position that the "finding of a Section 2 violation, in and of itself, mandates the removal of all existing at-large seats." Rather, we argued that, under the facts in this record, the retention of an at-large seat failed to remedy the Section 2 violation.

Dallas County continued to be denied an "opportunity to effectively participate in the election process," and all citizens had been denied the "right to govern their affairs" and to participate in elections that fairly reflect their voting strength in the county. Pet. App. A38.[13] Both petitioners had been given an opportunity to propose plans to remedy their Section 2 violations, and the Attorney General objected to both plans submitted for preclearance under Section 5 of the Voting Rights Act of 1965. Pet. 2-3; Pet. App. A27-A28, A37.[14] The court of appeals properly relied in part on these "preclearance defaults," Pet. App. A38, in addition to the protracted history of this litigation, in determining that it should order into effect a plan that "completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice," S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982). See *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965) ("the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future"). Faced with that situation and the need for prompt elections, the court of appeals acted properly in directing the adoption of an available plan that it concluded "vindicates the rights of Dallas County's black citizens whose opportunity to effectively

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[13] The last elections for the Commission were held in 1984, and Board members were last elected in 1982. The 1986 elections for both bodies had been enjoined pending the outcome of the litigation, and the court of appeals had stayed primary elections scheduled for June 1988. Pet. App. A37.

[14] Since the Board had submitted and obtained preclearance of a change from at-large elections to single-member districts, the Lichtman plan was closer to the Board's then-expressed preference than the 4-1 plan ordered by the district court.

participate in the election process has been denied." Pet. App. A38.

Regardless of whether any party below actually advocated adoption of the Lichtman plan in preference to the district court's plan (Pet. 17-19), it was clear that the district court gave serious consideration to that plan on its merits and, for reasons that the court of appeals determined were clearly erroneous, concluded that it was inferior to the district court's own plan. Pet. App. A23. No further hearing in the district court could have added any material facts to the record already before that court. Nor do petitioners contest (see Pet. 17) the fact that the court of appeals properly applied Rule 52(a) in overturning, as clearly erroneous, the district court's reasons for rejection of the Lichtman plan.[15]

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[15] Petitioners argue that no evidentiary hearing on the remedial plan was held in the Commission portion of the case, and thus that the Lichtman plan was not in issue at the time the district court adopted the Commission plan. That claim lacks merit. The Commission did have its day in court on the underlying question whether the fifth seat in the remedial plan should be a single-member district or an at-large seat. Although both petitioners complain that the district court was not given an opportunity to determine whether the Lichtman plan complies with Section 2, neither has suggested how that plan fails to comply with Section 2. Thus, nothing would have been gained by a remand for further hearing.

Petitioners contend (Pet. 20-23) that the court of appeals' failure to retain a role for the county probate judge on the Commission conflicts with this Court's decision in *Upham* v. *Seamon*, 456 U.S. 37 (1982). That argument lacks merit.

In *Upham*, this Court held that a court, in fashioning an apportionment plan, should not "intrude upon state policy any more than necessary" to cure the violation. 456 U.S. at 42, quoting *White* v. *Weiser*, 412 U.S. 783, 794-795 (1973). The district court in *Upham* erred in altering portions of the state's plan that had not been found to violate

Thus, under the circumstances of this case, where the voting rights of black citizens has gone unremedied for a substantial period of time and where all county citizens had been denied an opportunity to elect commissioners and school board members since 1986, we submit that the court of appeals did not exceed its authority in ordering prompt elections under a plan that the district court had had an opportunity to review and had rejected for reasons later found by the court of appeals to be based on clear error.[16]

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federal statutory or constitutional principles. Here, in contrast, the district court did find a violation of Section 2 in the use of an at-large electoral scheme. Moreover, the probate judge has countywide judicial functions in addition to his legislative role on the Commission, and is therefore elected at-large. See *Butts* v. *City of New York*, 779 F.2d 141, 148 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986). Accordingly, since the court held that the retention of an at-large seat would not remedy the Section 2 violation, the probate judge could not retain his position as a legislator on the Commission. The district court had also already rejected the option proposed by petitioners here, and by the United States below, of having the probate judge remain on the Commission in a non-voting capacity, while adding a fifth single-member district. See Pet. App. A4 n.2, A7. Accordingly, nothing would have been gained by remanding to the district court for consideration of ways to preserve a role for the probate judge on the Commission, as petitioners suggest. Pet. 22. Finally, any claim of an established "state policy" is tenuous in light of the fact that the probate judge is a member of the county commission in only 33 of the 67 Alabama counties. 661 F. Supp. at 957.

Finally, as the district court itself acknowledged (Pet. App. A59), there was even less justification for retention of an at-large member on the School Board, since the Board itself had proposed a remedial plan consisting of five single-member districts, and no special duties for the at-large member were contemplated under the court's plan.

[16] Petitioners' claim (Pet. 23-28) that the Lichtman plan violates one-person, one vote principles under the Equal Protection Clause does not warrant this Court's review. The deviations among the five districts in the plan fall within the 10% de minimis rule established for

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MARCH 1989

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state legislative plans. *Connor* v. *Finch,* 431 U.S. 407, 418 (1977). Moreover, "slightly greater percentage deviations may be tolerable for local legislative districts," because such districts have smaller populations than congressional or state legislative districts and local legislative bodies have far fewer members. *Abate* v. *Mundt,* 403 U.S. 182, 185 (1971). While a court-ordered plan must be held to a higher standard than one proposed by a state or local legislature, *Chapman* v. *Meier,* 420 U.S. 1, 26-27 (1975), petitioners err in claiming that the plan ordered into effect by the court of appeals is unconstitutional, since a 10% deviation is valid under *Connor* v. *Finch, supra.* In addition, the court of appeals in this case was faced with the need to hold prompt elections; elections had been enjoined, incumbents were holding office under a plan found to violate Section 2 of the Voting Rights Act, and the Board had failed to submit a plan that complied with Section 2. Because the record contained a plan that met Section 2 standards and that did not exceed the deviations allowable in a legislatively-drafted plan, the court of appeals did not abuse its discretion in ordering that elections be held under that plan. Finally, the school board must be reapportioned after the 1990 census. Because school board members are elected for six-year staggered terms, it is quite possible that there will be no further elections under this plan. Thus, the court of appeals' ruling presents no question of continuing importance, especially in light of the fact that this argument was raised for the first time in a petition for rehearing and therefore was not addressed by the court of appeals.

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NO. 88-992

IN THE

Supreme Court of the United States

October Term, 1988

DALLAS COUNTY BOARD OF EDUCATION, etc., et al.,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF SAMSON CRUM, FREDERICK D. REESE, EDWIN MOSS AND CLARENCE WILLIAMS

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No. 88-992

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DALLAS COUNTY BOARD OF EDUCATION,
etc., et al.

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

On Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

Motion For Leave To File Brief Amicus Curiae And Brief In Opposition To Petition For Writ Of Certiorari On Behalf Of Samson Crum, Frederick D. Reese, Edwin Moss And Clarence Williams

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Come now the above listed individuals, by counsel, and move the Court for leave to file a brief, amicus

curiae, in opposition to the petition for writ of certiorari.[1]

Amici are four black citizens of Dallas County, Alabama, who have long been active in civil rights matters in the county, including voter registration, elections, education and employment. Samson Crum, for example, a returning World War II veteran, sought to register twice a month on the two days the voter registrar's office was open during 1945 and 1946. He was unsuccessful. In 1978, after urging the district attorney to prosecute vote fraud, Crum's car was twice shot into.

This case is significant in that it involves the county where the Voting

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1. Because some of the county commission defendants have changed and the status of their attorney has not been decided, counsel for the county commission litigants was not able to consent to the filing of this brief.

Rights Act of 1965 was born, and has resulted in integrated, democratically elected government for this county for the first time since Ulysses S. Grant was president. It is believed that the views of amicus will be beneficial to the Court.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly reversed the district court's order fashioning a remedy for violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 where the district court's plan included an at-large seat for the petitioner school board:

   (a) when the petitioner school board had previously adopted an all single member district method of election;

   (b) where the district court made no determination under Chapman v. Meier, 420 U.S. 1 (1975), Mahan v. Howell, 410 U.S. 315 (1973) and Connor v. Johnson, 402 U.S. 690 (1971) that there existed a singular combination of unique factors justifying an at-large seat.

2. Whether the court of appeals appropriately exercised its discretion in adopting an election remedy to be imple-

mented without delay, when elections for both 1986 and 1988 had previously been stayed.

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set out in the motion for leave to file this brief, supra.

STATEMENT OF THE CASE

The Dallas County Board of Education seeks review of the court of appeals' remedial order in this decade-old litigation. The judgment of the district court that the at-large elections of the five member school board violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 was not appealed.

In 1978, the United States sued the Dallas County Board of Education, hereafter "school board," challenging the at-large method of electing the school board under, inter alia, the Voting Rights Act, 42 U.S.C. § 1973.[1] After the court of

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1. The United States also sued the

appeals twice reversed the district court's determinations that the school board was entitled to a dismissal,[2] the district court entered judgment against the school board under Section 2 of the Voting Rights Act and ordered that the board prepare and file "a fair election plan" with the court and simultaneously seek preclearance of that plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. No. 78-578-H, slip op.

Dallas County Commission challenging its method of election. Though the two defendants were severed on motion of the school board, No. 78-578-H (S.D. Ala. Jan. 15, 1986), JSA-64, they remained connected. The school board and county commission jointly filed the petition for writ of certiorari.

Subsequent to the filing of the petition, the county commission has voted to withdraw its petition. This brief will address issues related to the school board.

2. 739 F.2d 1529 (11th Cir. 1984); 791 F.2d 831 (11th Cir. 1986).

5,6 (S.D. Ala. Feb. 11, 1987).

The school board did not appeal, and proceeded to adopt an all single member method of election with a five single member district plan. Proposed Plan of Election for the Dallas County Board of Education (filed Mar. 31, 1987). The Attorney General determined that the method of election was not objectionable, but did object to the particular plan selected by the school board because it over-concentrated black citizens in one district and fragmented a black community between two other districts. Letter of June 1, 1987 from Wm. Bradford Reynolds, Assistant Attorney General, to School Board.

In the severed part of the litigation concerning the county commission, the court had also found a Section 2 violation.[3] Because the county commission had been unable to secure

preclearance from the Attorney General of the plan it adopted, the district court fashioned its own plan, which consisted of four single member districts, and retained the at-large election of the probate judge who served on the county commission ex officio.[4]

After adopting that plan for the county commission, the district court notified the school board and the United States that it proposed to adopt the same plan for the school board, though it recognized "that the same unique circumstances which rendered the [court's plan for the county commission] a fair election plan with respect to the Dallas County Commission do not exist with respect to the Dallas County Board of

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3. 636 F.Supp. 704 (S.D. Ala. 1986).

4. 661 F.Supp. 955 (S.D. Ala. 1987).

Education." No. 78-578-H, slip op. 3 (S.D. Ala. Sept. 18, 1987), JSA-59. The lack of "unique circumstance" was that the school board had no member comparable to a probate judge, a county wide officer with duties unrelated to the commission. The district court noted, however, that the United States had desired that the county commission and the school board be elected from the same districts. Ibid.[5]

An evidentiary hearing was held at which testimony was taken regarding the court's plan. The United States called witnesses to testify regarding two five

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5. The United States made that argument in support of a five district plan for the county commission when no rationale for an at-large seat for the school board existed. The district court adopted a four/one plan for the county commission first, and in a classic Catch-22, used that to justify the same plan for the school board to avoid "voter confusion and administrative difficulties." JSA-11.

single member district plans. Hearing o October 2, 1987. The district court rejected those plans, JSA-11 through 13, and adopted its county commission plan with its at-large seat for the school board, concluding that this plan was "a fair election plan for the Dallas County School Board." JSA-11.

The opinion of the district court adopting this plan did not discuss the standards applicable when a federal cour fashions a districting plan. It did not articulate any singular combination of unique factors requiring the utilization of an at-large position, Chapman v. Meie 420 U.S. 1, 21 (1975), did not discuss any rationale for ignoring the school board's choice of having five single member districts, White v. Weiser, 412 U.S. 783, 705 (1973), and did not discus why it did not limit its modification of the school board's plan to those parts

objected to by the Attorney General, Upham v. Seamon, 456 U.S. 37, 43 (1982).

The court of appeals reversed. It did not merely find the district court's plan was inadequate to remedy the violation, but held "[t]he district court's proposed election plan does not comply with Section 2 of the Voting Rights Act of 1965..." JSA-34.

After reciting the evidence that led the district court to find a violation, the court of appeals concluded:

> If anything, the district court's election plan, which calls for an at-large election of the fifth member to the School Board, perpetuates rather than ameliorates the inequities which have resulted in an abridgement of Dallas County's black citizens' access to the political process.

JSA-34.

The court of appeals reviewed the record of the five single member district plan drafted by Dr. Allan J. Lichtman, JSA-34 through 38, and concluded that it

would "vindicate[] the rights of Dallas County's black citizens whose opportunity to effectively participate in the election process has been denied." JSA-38. The court of appeals vacated and remanded with direction that the Lichtman plan be implemented in accordance with state law in time for the general election in November, 1988. JSA-38.

THE QUESTIONS PRESENTED BY THE PETITION ARE NOT SUBSTANTIAL

Argument

I. The Decision Vacating the District Court's Order Which Reintroduced An At-Large Seat Was Proper.

Petitioner school board argues that the court of appeals violated the clearly erroneous rule, Rule 52(a), F.R.Civ.P. in determining that the district court's plan did not remedy the Section 2 violation. The difference between the rulings of the two courts below was not one of

fact. The difference was that the district court found that reintroducing an at-large seat for the school board was "a fair election plan." JSA-11. The court of appeals relied upon the facts found by the district court. It noted that evidence introduced at the hearing on the plans "reveals that many of the concerns which prompted our remand of this case in 1984 continue to exist." JSA-31. It concluded that the district court's plan itself violated the Voting Rights Act, perpetuating the abridgement of black citizens' elective franchise. JSA-34. Properly rejecting this outcome, the court of appeals noted that "any proposal to remedy a Section 2 violation must itself conform with Section 2." JSA-29, quoting Dillard v. Crenshaw County, 831 F.2d 246, 249 (11th Cir. 1987).

The opinion of the court of appeals that the district court erred in adopting

an at-large seat is correct for additional reasons. First the district court ignored the decisions of this court holding that "in fashioning apportionment remedies, the use of single-member districts is preferred," Mahan v. Howell, 410 U.S. 315, 333 (1973), "[u]nless the District Court can articulate a 'singular combination of unique factors'" that justifies a different result. Chapman v. Meier, 420 U.S. 1, 21 (1975). Connor v. Johnson, 402 U.S. 690 (1971).

Second, this Court has held that in apportionment matters, federal courts "should follow the policies and preferences of the State...whenever adherence to state policy does not detract from the requirements of the Federal Constitution..." White v. Weiser, 412 U.S. 783, 795 (1973) Coupled with this, this Court has held that objection to part of an election plan by the Attorney General

does not give a federal court authority to modify the precleared part of the plan. Upham v. Seamon, 456 U.S. 37, 43 (1982). Here the method of election adopted by the school board and precleared by the Attorney General had no at-large seat. When the district court reintroduced an at-large seat, the school board was placed in the untenable position of defending a court ordered plan which ignored its own decision to adopt all single member districts. The school board has not attempted to explain, much less justify, the district court's decision to ignore the school board's valid, precleared policy choice.

II. The Decision of the Court of Appeals To Implement a Remedy Without Delay Was Proper Where the Last Two Elections had Been Enjoined and the Litigation Had Taken Ten Years.

The school board contends that the court of appeals erred in adopting a

remedial plan without remanding for a hearing to determine whether the plan conformed to Section 2 standards. This is not an argument meriting review by this Court, primarily because an evidentiary hearing was held at which the plan adopted was examined. The school board's real complaint is that it came unprepared to that hearing.

A. A Hearing Was Held on the Plan Adopted by the Court of Appeals.

When the district court notified the parties that it proposed to adopt the county commission plan for the school board, it ordered "that an evidentiary hearing be conducted...for the purpose of addressing the parties' objections, if any, to the Court's proposal. JSA-60.

At that hearing when the United States began offering evidence, counsel for the school board stated "I did not understand that this hearing would be an

evidentiary hearing..." (Transcript of Oct. 2, 1987, 4.) When the district court asked counsel for the school board what testimony he would expect to offer, counsel replied, "We have no testimony to offer." Ibid., 5.

Two witnesses testified at that hearing. One was Allan J. Lichtman, who drafted the plan the court of appeals ordered implemented. Counsel for the school board cross examined Lichtman (Transcript of Oct. 2, 1987, 45-59). School board counsel particularly sought to probe Lichtman's opinion that the school board's plan was not racially fair by asking Lichtman to contrast it to the plan he devised. Ibid., 46. School board counsel and the trial judge asked Lichtman a number of questions covering a range of election issues during that cross examination. But after asking Lichtman to contrast a 61 percent black

district that he drew to an at-large seat, defense counsel had no more questions regarding the particulars of the Lichtman plan, nor whether the plan met the requirements of the fourteenth amendment and Section 2 of the Voting Rights Act. Ibid.

The school board had the opportunity to cross examine the authors of the two five single member district plans. The district court discussed details of the Lichtman plan and the other plan and rejected them. JSA-12, 13.

After determining that the plan fashioned by the district court was an inadequate remedy, the court of appeals turned to the evidentiary record JSA-34 through 38, and determined that the Lichtman plan was an appropriate remedy for the violation. Noting that it would ordinarily remand to the district court with directions to implement an election

plan which fully complies with Section 2, JSA-37, the court of appeals concluded there was no need for further proceedings because the record already contained the Lichtman plan as an adequate remedy. JSA-38. It noted that "the School Board has had ample opportunity to devise an election plan which cures the section 2 violation." JSA-37. Accordingly, it ordered the Lichtman plan implemented in accordance with state and local laws. JSA-38.

B. The Record of this Litigation Justified the Court of Appeals Taking Efforts to End the Delay in Holding Elections.

On October 18, 1988, ten years to the day after this litigation began, the district court signed an order setting a special election schedule for the Dallas County School Board. This order came after the court of appeals had twice reversed the district court's conclusions

that the school board had prevailed on the merits, had directed that the district court enter a preliminary injunction, had reversed the remedy adopted by the district court, had ordered the district court to implement a specific plan, and had rejected the motion filed by the district court for clarification of the mandate on remedy. Additionally, elections had not been held in 1986 and the June 1988 primaries had been stayed.

It is against this history that the decision of the court of appeals to select a plan from the record, order it implemented, and hold primaries in time for the general election in November, 1988, must be assessed.

Petitioners do not question the authority of the court of appeals to issue a specific mandate. The court of appeals did not issue an injunction, but followed the practice of the circuit,

when time and circumstances require, of framing the injunction and directing that this be made the order of the district court. Davis v. Board of School Commissioners of Mobile County, 322 F.2d 356, 359 (5th Cir.) cert. den. 375 U.S. 894 (1963).[6]

The court of appeals faced a compelling situation. No elections had been held for the school board since 1984. There was time, when the court of appeals acted on July 13, 1988, to hold primaries prior to the November general election. A primary concern of the court of appeals was that the delay in holding elections cease. The court was aware of

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6. Even were there defects in the plan chosen, the court acted properly in fashioning this relief. A federal court may properly adhere to the general election timetable even if there were legal errors in its plan. Upham v. Seamon, 456 U.S. 35 (1982).

the history of the litigation. Acknowledging that it would ordinarily remand for consideration of remedy, JSA-37, the court of appeals elected to exercise its equitable powers to assure relief.

> Because of this lawsuit, all the citizens of Dallas County have been denied the right to govern their affairs. How long may a court of the United States allow the rights of citizens to be trampled through pre-clearance defaults and litigation plans? It is time for an election in Dallas County!

JSA-38.

Subsequent events verified court of appeals' concern over delay, and the likelihood of further delay. Though the court of appeals ordered that primaries be held in time to hold the general election in November, JSA-40, the efforts to implement that mandate were slow. The district court ordered the United States to file a proposed election schedule within one day, and the United States did

so. But the district court then filed its own motion for clarification of the mandate. JSA-66. The court of appeals quickly rejected this motion save to modify its mandate to allow the elections to be concluded by December 31, 1988. JSA-63.

Counsel for the defendant election official in charge of conducting elections waited until October 6, 1988 to write seeking permission to formulate a schedule. Letter of Oct. 6, 1988 from Cartledge Blackwell to Judge W.B. Hand. The district court allowed this request, and did not enter an order setting the election until October 18, 1988, a date which made it a practical impossibility to utilize the general election date, with its expected high voter turnout, for any of the special election dates. The court set the primary, run-off and general elections beginning the Tuesday

before Thanksgiving and ending the Tuesday after Christmas. No. 78-578-H (S.D. Ala. Oct. 18, 1988).

Those elections have now been held, and on the Martin Luther King holiday, January 16, 1989, integrated government came to Dallas County for the first time since Ulysses S. Grant was president. That would not have happened if the court of appeals had not exercised its authority to implement relief.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari does not present issues meriting review and should be denied.

Respectfully submitted,

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